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47647

IRWIN MILLARD,

Appellant,

v.

CASTLE BAKING COMPANY, a corporation,  
and N. TITO,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a personal injury case. After defendant failed to appear, plaintiff's motion for a default order was granted and the cause assigned for trial. After hearing evidence, the court rendered an ex parte judgment in plaintiff's favor for \$2500. Fifty-two days later, defendant filed a motion to set aside the judgment. Without a hearing, the court set aside the judgment, quashed the service of summons, and vacated the default order. Plaintiff appeals.

The alleged injuries resulted from an automobile accident during May, 1956. Suit was brought in November, 1957. Summons was served on defendant corporation by leaving a copy thereof with a clerk or typist named Hoy. Defendant failed to answer the complaint or appear, and plaintiff proceeded to obtain the default order and judgment.

Defendant contends in its motion and supporting affidavit that it was not properly served with summons and that the court was therefore without jurisdiction, and that the default order and judgment order were improper.



A party seeking to set aside a judgment must establish the facts alleged in his motion by a preponderance of the evidence. Topel v. Personal Loan & Savings Bank, 290 Ill. App. 558. In our opinion, that burden was not satisfied since defendant's affidavit was the sole basis for quashing service and setting aside the judgment, and issues had been made by plaintiff's answer to the motion. To prevail, defendant must offer conclusive evidence that the person served was not a proper person to receive service. As the court said in Philadelphia Rapid Transit Co. v. Coast Fir & Cedar Products Co., 241 Ill. App. 320, at p. 326:

Where the return of the officer serving the writ is regular upon its face, but it is sought to be shown that where a corporation is served with process, by leaving a copy with one of its agents, the person served is not the agent of the corporation, evidence dehors the record must be offered. . . .

Defendant argues that plaintiff's admission that the person served was a clerk or typist places the question of agency beyond dispute. We do not agree. Plaintiff's answer to the motion and the exhibits it attached allege that Hoy had received service in several other suits in which defendant appeared and answered. A clerk or typist could easily be an agent for the purpose of receiving service of process. In view of the issues on the motion, the court should have heard evidence before quashing the service.

The court erred in quashing the service and setting aside the default order and judgment. For the reasons given,



-3-

the judgment is reversed and remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MURPHY, P. J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.





47676

DAISY L. SPRINGS,

Appellee,

v.

JOHN L. SPRINGS,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

28 LA. 51<sup>2</sup>

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from orders denying a motion to vacate a decree for separate maintenance and denying a petition for a change of venue, and from a subsequent contempt order against defendant for failure to comply with the decree. No brief was filed in this court by plaintiff.

Plaintiff filed a suit for separate maintenance and defendant counterclaimed for a divorce. Plaintiff then withdrew her complaint for separate maintenance and filed an amended complaint for divorce. Both divorce actions were subsequently abandoned. November 7, 1957, plaintiff filed her second amended complaint for separate maintenance, which resulted in the present decree.

The parties were married in 1953 and separated early in December, 1956. They have one child, who is living with plaintiff in a house owned by the parties as joint tenants. The chancellor found that the separation was due solely to defendant's extreme and repeated cruelty. He also found that plaintiff was without sufficient means to support both herself and her child, and to pay the indebtedness on the house and her attorneys' fees.



He found defendant financially able to give support for the child and pay the indebtedness and fees. July 29, 1958, a decree was entered granting plaintiff custody of the child and exclusive use and occupancy of their home and its furnishings, ordering her to make future payments on one of the mortgages on the house, and suspending her right to alimony and support "at this time." Defendant was ordered to pay plaintiff twenty dollars per week as child support, to pay within thirty days past due mortgage installments of \$2446.08, to make future payments on certain of these mortgages, and to pay within sixty days plaintiff's attorneys' fees of \$1412.50.

Defendant moved to vacate this decree on August 26, 1958. While this motion was pending, plaintiff petitioned for a rule to show cause, charging that defendant had failed to pay the past due mortgage payments. Defendant answered. His motion to vacate was denied September 25, 1958, and he then petitioned for a change of venue in the contempt proceedings. The change of venue was denied on October 1, 1958, and the hearing on the rule to show cause was then commenced. Defendant was found guilty of contempt and was committed to the county jail.

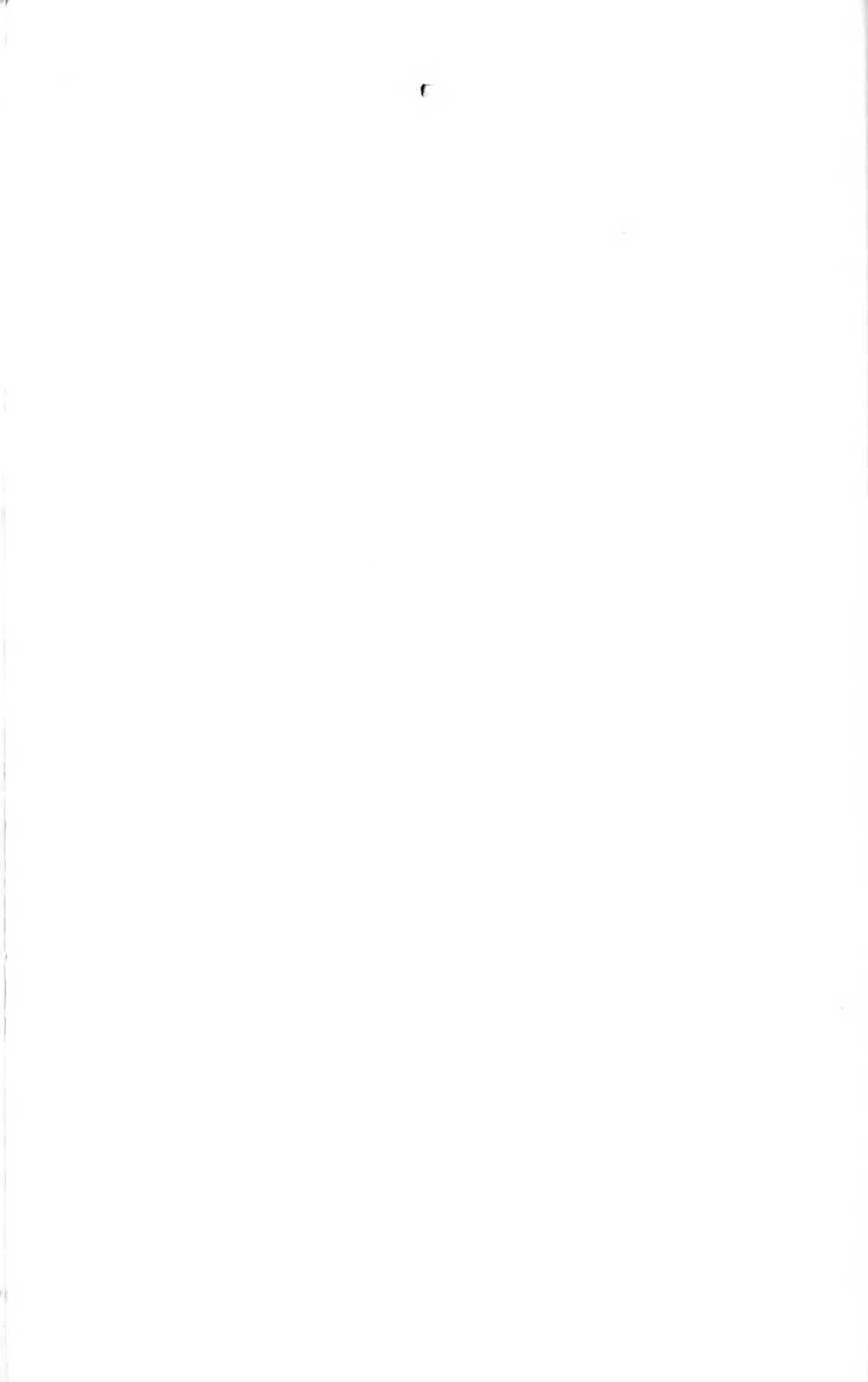
Defendant's contentions here are that: 1) the chancellor improperly adjudicated property rights in this action by directing the payment of mortgages and giving plaintiff exclusive use of the home; 2) the chancellor's findings regarding the cause of the separation and the financial abilities of the parties are contrary to the manifest weight of the evidence; 3) defendant's request for a change of venue was erroneously



by the evidence.

Defendant is correct in stating that the property rights of the parties may not be adjudicated in a separate maintenance action but we think he misapprehends the meaning of "property rights" when the phrase is used in this context. Defendant's cases concern adjudications of title, which is not involved in the present decree. In Weber v. Weber, 327 Ill. App. 411, a decree for separate maintenance ordered the husband to pay the mortgage installments on a house held by the parties in joint tenancy and gave the wife the right to continue to live there. The court held that this was not an adjudication of property rights and that the general rule was therefore inapplicable. This court has approved similar decrees in O'Laughlin v. O'Laughlin, 4 Ill. App. 2d 323, and Rottmayer v. Rottmayer, 342 Ill. App. 454.

The testimony concerning the cause of the separation is conflicting. Briefly, plaintiff testified that defendant had beaten her on several occasions. Defendant denied this, and testified to certain instances of the wife's misconduct, which she denied. Each party offered some corroboration. In such a situation, any findings must be based largely on the credibility given to the testimony of the various witnesses. The chancellor saw the witnesses and heard them testify, and is obviously in a far better position than we are to determine who was telling the truth. We cannot say the chancellor's findings are contrary to the manifest weight of the evidence or clearly erroneous. See Berlingieri v. Berlingieri, 372 Ill. 60;



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-4-

Arliskas v. Arliskas, 343 Ill. 112; Mason v. Mason, 342 Ill. App. 140; Ryan v. Ryan, 321 Ill. App. 467.

The same is true of the chancellor's findings regarding the parties' financial capabilities. Defendant was quite capable of paying the mortgage installments prior to this suit. He claims that since then he has had to cut down drastically on his working hours under doctor's orders, but according to his testimony this has not prevented him from putting in a great deal of time working about his brothers' store without pay. He is able to furnish an apartment to his parents rent-free in another building owned by him. This is inconsistent with his professed inability to provide for shelter for his wife and child. Also, defendant's claim that his net income is only half the amount of his wife's, taking into account child support payments, must be viewed in light of the fact that the wife's income must provide for the child.

Defendant argues that he should not have been held in contempt because he was financially unable to comply with the decree. While the contempt proceedings followed the decree by about two months, the relevant facts were essentially the same and our previous conclusion effectively answers this argument. We see no error in the chancellor's finding the defendant guilty of contempt.

Defendant contends that the chancellor erred in denying his request for a change of venue in the contempt proceedings. His petition, charging recently discovered prejudice on the part of the chancellor, was in proper form and was filed before the





hearing on the rule to show cause had begun. Defendant is correct in stating that a change of venue is an "absolute right" given to a litigant by our Venue Act (Ill. Rev. Stat. Ch. 146), but the change of venue will be refused if it has not been requested in "apt time." A request has not been made in "apt time" if granting it would allow the litigant to first try out the attitude of the trial judge and then avoid an expected adverse ruling by obtaining a change of venue. See People v. Chambers, 9 Ill. 2d 83; Comm'rs. of Drainage District No. 1 v. Goembel, 383 Ill. 323; Paramount Paper Tube v. Capital Engineering, 11 Ill. App. 2d 456; Russell v. Russell, 333 Ill. App. 68. The application of this principle to a particular situation calls for the exercise of discretion on the part of the trial court. Caplow v. Caplow, 255 Ill. App. 389. Defendant relies upon Des Chatelets v. Des Chatelets, 292 Ill. App. 357, but this case merely discusses the applicability of the Venue Act to certain supplementary proceedings without raising any question of timing. Defendant's petition states that he had no knowledge of the chancellor's prejudice until September 25, 1958, but this merely overcomes the bar raised by section 6 of the Venue Act and is not material to the question raised here. The same chancellor had presided throughout these lengthy proceedings, and we find nothing in the record to indicate that defendant's counsel had ever previously intimated that he was prejudiced. In attempting to defend himself in the contempt proceeding, the defendant merely pressed the same argument he had just unsuccessfully raised in the main proceeding, his inability to pay the past due mortgage installments. In view of



the continuity of these proceedings and the similarity of the issues raised in the contempt proceeding with those previously considered, we believe that the chancellor did not err in denying defendant's petition for a change of venue.

We agree with defendant that the assessment of attorneys' fees is not supported by the evidence. We find little in the record to indicate what services were rendered, and no evidence whatsoever concerning the value of these services. While the chancellor is well qualified to exercise his own judgment as to what is reasonable compensation for the services rendered, he must base his determination on a showing of what these services were and evidence concerning their fair and reasonable value. Abrams v. Abrams, 15 Ill. App. 2d 290; Ribergaard v. Ribergaard, 349 Ill. App. 99. Without such a showing in the record, we have no basis for determining on review whether or not these fees were properly allowed.

We conclude that the chancellor correctly denied defendant's motion to vacate and his petition for a change of venue, and did not err in finding defendant guilty of contempt; but we also conclude that the order for attorneys' fees was erroneously entered. The decree is therefore affirmed in part and reversed in part, and remanded to the trial court for further proceedings with respect to the allowance for plaintiff's attorneys' fees.

AFFIRMED IN PART, REVERSED AND  
REMANDED IN PART.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.



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47756

FLORENCE J. LORENCE,

Plaintiff - Appellant,

EDWARD ADAMS and CHESTER ADAMS,

Defendants - Appellants,

v.

ALICE H. PLATECKI, individually and  
as Administratrix of the Estate of  
MARCELLA DOMINIAC, Deceased,  
CHARLOTTE P. MORRISON, HARRY MORRISON,  
JOSEPH DOMINIAC and BARNEY DOMINIAC,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

23 I.A.<sup>2d</sup> 52

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree for partition, which, in the event of a sale, directs distribution of the entire net proceeds of the sale to the administratrix of the estate of the former owner of the real estate. The trial court entered an order, finding that there was no just reason for delaying an appeal.

The former owner, Marcella Dominiac, a widow, died intestate on March 1, 1957, seized in fee of the premises and left her surviving as her heirs at law, the parties to this suit, all members of her immediate family. The complaint for partition was filed on October 31, 1957, and the administratrix was appointed November 21, 1957. The decree for partition was entered November 21, 1958.



The transfer of the appeal to this court, by the Supreme Court, disposes of the point that a freehold is involved.

The principal contention of appellants is that the proceeds of the sale, over and above an amount needed to discharge the estate obligations, should be distributed directly to the parties entitled thereto.

Appellees contend that it is only after all just debts are paid that the heirs can inherit what remains of the estate, and as the proceeds from the sale will constitute decedent's entire estate, the administratrix is the proper person to receive the entire proceeds from the sale to pay decedent's debts and make distribution as directed by the order of court. The authorities cited do not sustain this theory.

When the partition is among the heirs of a deceased ancestor, who are the owners of the land charged with the payment of the debts of the ancestor, the Illinois cases have consistently held that enough of the proceeds of the sale should be set aside as a fund from which to pay the claims and obligations of the ancestor. (Borders v. People, 31 Ill. App. 483, 484 (1888); Brown v. Sunderland, 251 Ill. 523, 526.) The administrator has no interest in the land (Smith v. Smith, 174 Ill. 52, 58), but it is proper to order the payment of a sufficient sum to the administrator to pay the debts which are a charge upon the estate (Wachter v. Doerr, 210 Ill. 242, 244 (1904)). The excess of the proceeds of the sale, though in the form of money, remains impressed with the character of real estate for the purpose of determining who is entitled to receive it and to be





divided according to the interests of the parties, as directed by the court. Paragraph 62 of the Partition Act (Ill. Rev. Stat. 1957, Ch. 106); Smith v. Smith, 174 Ill. 52, 60.

We find no Illinois authority for the distribution of the entire proceeds of the sale to the administrator of the estate of the deceased ancestor, in the absence of a showing that the entire proceeds of sale will be required to pay the debts of the ancestor. We conclude that it is proper only to order the payment of a sufficient sum to the administrator to pay the debts which are a charge upon the estate of the ancestor and costs of administration.

This record contains nothing to justify the distribution of the entire proceeds of sale to the administratrix of the estate of Marcella Dominiak, deceased. The decree should have directed distribution to the administratrix of only so much of the proceeds as is necessary to pay the claims and costs of administration and directed the balance to be distributed by the master to the parties entitled thereto, as directed by paragraph 62 of the Partition Act.

The decree of the Circuit Court is reversed and the cause is remanded with directions for further proceedings in accordance with the views expressed herein.

REVERSED AND REMANDED  
WITH DIRECTIONS.

KILEY AND LEWE, JJ., CONCUR.

ABSTRACT ONLY.



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT - FIRST DIVISION

May Term, A.D. 1959

VIRGINIA PENNINGTON, Administrator  
of the Estate of ERNEST PENNINGTON,  
deceased,

Plaintiff-Appellee,

vs.

DONALD H. McLEAN, JR.,

Defendant-Appellant.

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Appeal from the  
Circuit Court of  
DuPage County.

DOVE, J.

This is a wrongful death case and the issues made by the pleadings were submitted to a jury resulting in a verdict and judgment in favor of the plaintiff and against the defendant for \$22,500.00. Upon a review of the record of the trial court this court held, as a matter of law, that plaintiff's intestate, just before and at the time of the collision of the truck which plaintiff's intestate was driving and the automobile driven by the defendant, was not in the exercise of due care for his own safety and reversed the judgment of the trial court. (Pennington v. McLean, 16 Ill. App. 2d, 316).

The Supreme Court allowed plaintiff's petition for leave to appeal and reviewed the judgment of this court and concluded that reasonable men would differ, when viewing the

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evidence in this case, as to whether plaintiff's intestate should have seen, or should have regarded defendant's car as an immediate hazard when he drove his truck into the intersection upon the occasion in question. Accordingly the Supreme Court held that this court erred in setting aside the verdict of the jury on the ground that plaintiff's intestate was guilty of contributory negligence as a matter of law and reversed the judgment of this court and remanded this cause to this court with directions to consider any other alleged errors in the record. (Pennington v. McLean, 16 Ill. 2d; 158 N.E. 2d 624).

The other errors not considered by this court upon its prior consideration of this appeal upon which appellant relied upon for a reversal are, (1) that the verdict of the jury is manifestly against the weight of the evidence and, (2) the prejudicial conduct of counsel for plaintiff upon the trial of the cause.

An examination of the previous opinions of this court and of the opinions of the Supreme Court will disclose the factual situation which existed just before and at the time of the collision of the vehicles involved in this proceeding and therefore need not be repeated.

Romines v. Ill. Motor Freight, Inc. 21 Ill. App. 2d 380; 158 N.E. 2d 97 was an action to recover for the alleged wrongful death of Doyt Romines, and it was there insisted that the verdict of the jury in favor of the plaintiff was manifestly against the weight of the evidence. After reviewing the evidence this court, in affirming the judgment of the trial court, said:



(pp. 385-386) "With reference to the contention that the verdict is against the manifest weight of the evidence, it is immaterial whether we agree or disagree with the jury's verdict. A court of review can set aside a verdict as being against the manifest weight of the evidence only when it is obvious or clearly evident that the jurors have arrived at an incorrect result. *Griggas v. Clauson*, 6 Ill. App. 2d 412; *Olin Industries Inc. v. Wuellner*, 1 Ill. App. 2d 267".

In *Morkevich v. A.T. & S.F. Railway Co.* 263 Ill. App. 1,15, it was said "Manifest means clearly evident, clear, plain, indisputable". In *Olin Industries Inc. v. Wuellner*, 1 Ill. App. 267, it was said: (p. 271) "To be against the 'manifest weight of the evidence' requires that an opposite conclusion be clearly evident".

In the opinions of the Supreme Court and in our former opinions the testimony of the defendant was commented upon. It was not, at all times, consistent or satisfactory. The jury, after seeing him and <sup>after hearing him and</sup> the other witnesses testify and after considering all the evidence and facts and circumstances in evidence concluded that the defendant was negligent and that his negligence was the proximate cause of the collision which resulted in the death of plaintiff's intestate. Our study of this record does not indicate that an opposite conclusion than that arrived at by the jury is clearly evident. The verdict of the jury therefore cannot be regarded as manifestly against the weight of the evidence.

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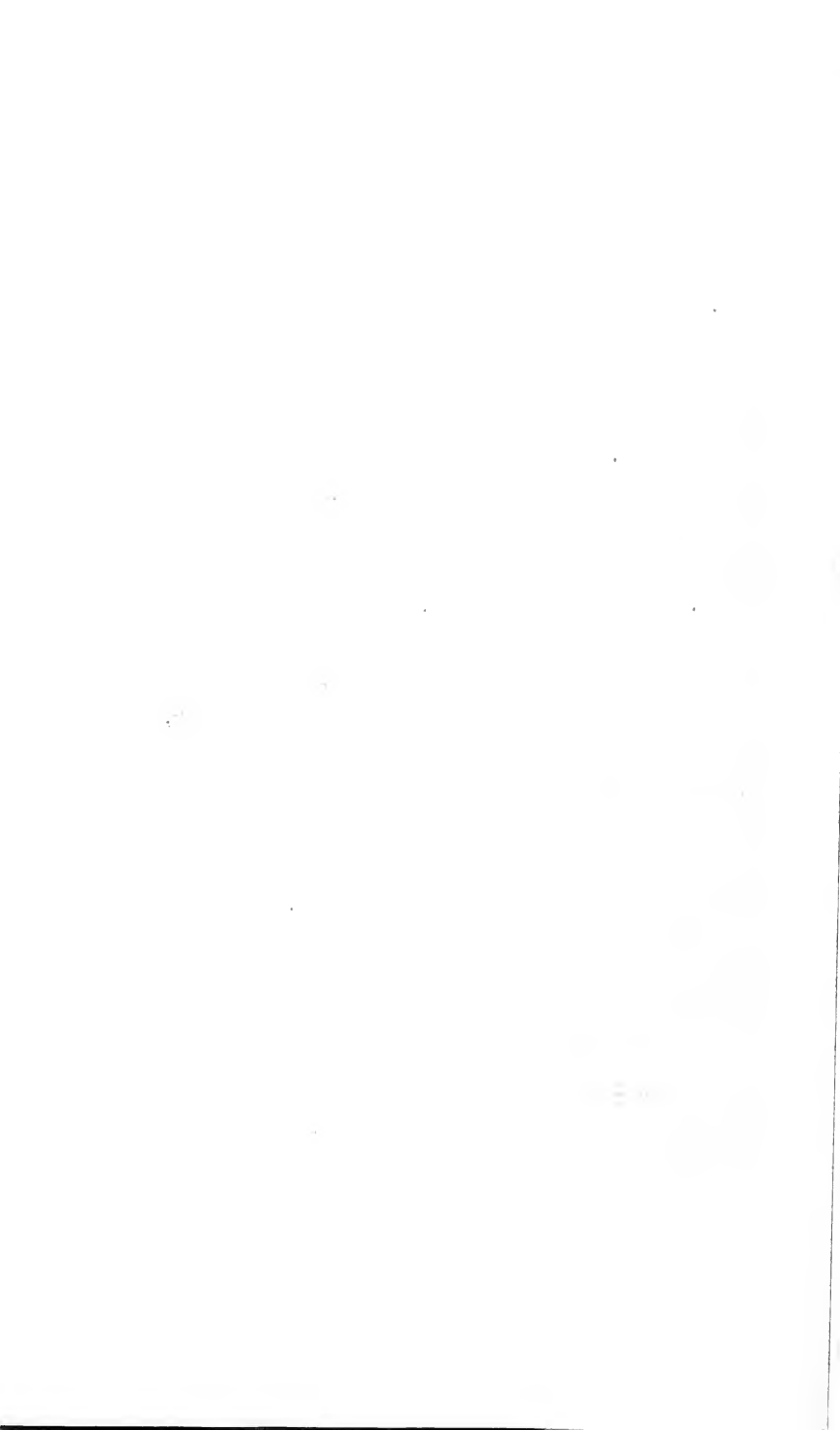
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Appellant's remaining contention is that this judgment should be reversed on account of prejudicial conduct of counsel for plaintiff during the closing arguments to the jury. During his argument to the jury counsel for plaintiff commented upon the testimony of appellant and said: "I was completely astounded myself when he (defendant) gets on the stand today and testifies that he saw the car (of decedent) 150 feet away. What manner of man are we dealing with? It was all I could do to restrain myself". At this point counsel for appellant objected and before the court could rule on the objection, counsel for appellee continued: "Anger is anti-social. Anger is destructive". Again counsel for appellant objected and the court said: "The objection is sustained and the jury is instructed to disregard it".

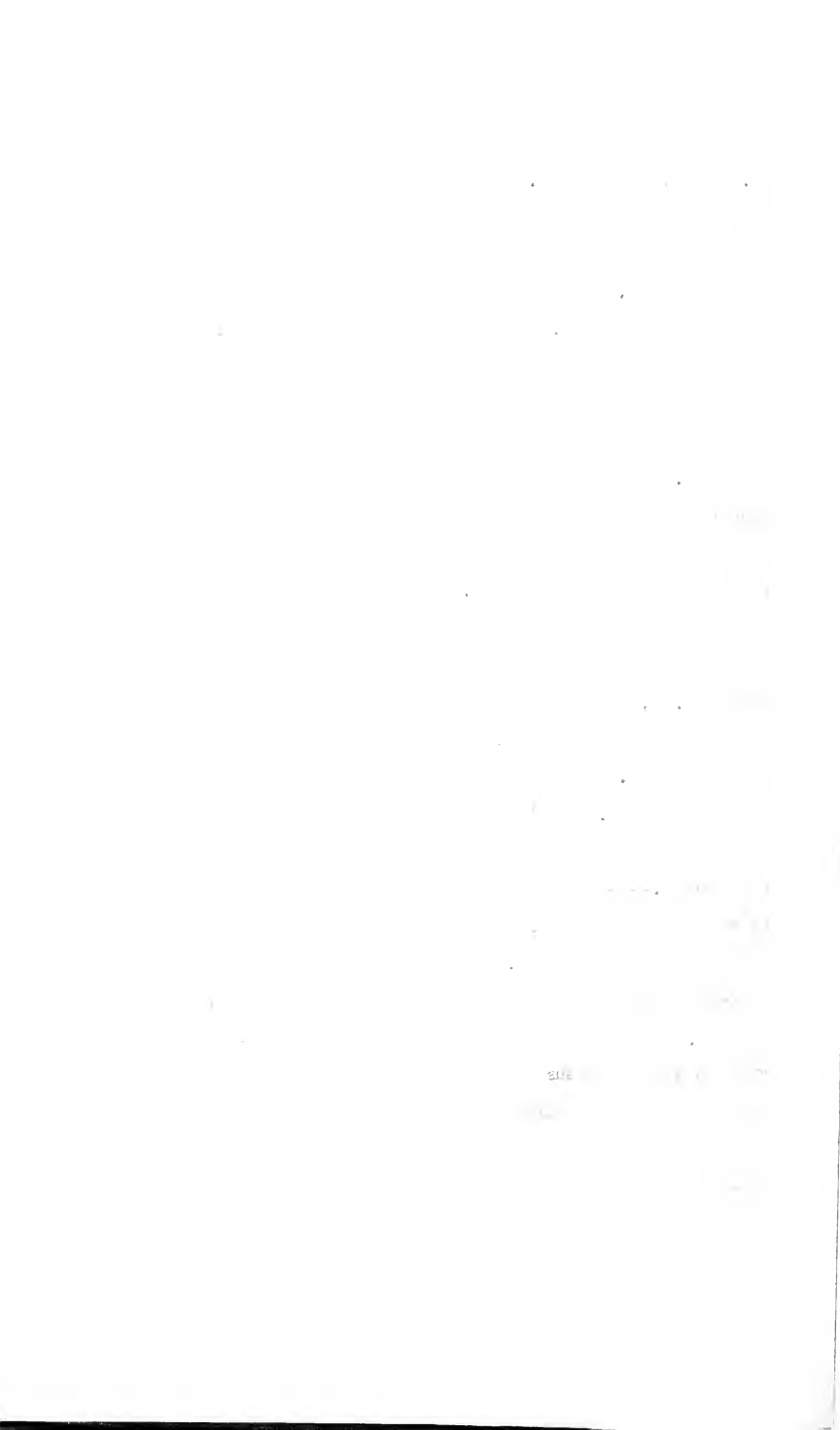
During the course of his argument Mr. Durek, counsel for defendant stated: "The court will instruct you that in circumstances such as these on a preferential highway the law is such that one proceeding in an intersection to such a highway, where the state has seen fit to put a stop sign, and you will observe it there in plaintiff's exhibit No. 10, that that person must yield the right-of-way to traffic on that highway". At this point counsel for plaintiff interrupted and stated: "That is not the law, there is no evidence in this case at all that this man (decedent) did not stop at that stop sign. You be fair in your argument will you?" Counsel for defendant replied: "Let me finish the statement of the law". Thereupon counsel for plaintiff retorted: "I am fearful of letting you finish anything,



Mr. Burek, sometimes". Counsel for defendant then moved that those remarks be stricken and before the court could rule counsel for plaintiff said: "You shouldn't have asked the question". The court then stated: "Those remarks will be stricken" and Mr. Burek continued his argument.

It will be noted that in the first instance complained of the trial court sustained the objection of counsel for defendant and instructed the jury to disregard the objectionable argument. In the second instance the retort and remarks of counsel for the plaintiff, after he had interrupted Mr. Burek's argument and characterized it as unfair, were promptly and properly stricken by the trial court.

The record further discloses that during the course of the argument counsel for defendant stated: "Let's take first, point No. 1, that the plaintiff must establish by a preponderance of the evidence, that Mr. Pennington was in the exercise of ordinary care. They must establish that by a preponderance of the evidence. Let's see what evidence whatsoever there is in this case of the plaintiff's due care in the operation of this truck,-----There isn't one word from the witness stand as to exactly what Mr. Pennington did or saw in reference to going into the highway". Counsel for plaintiff objected and stated: "How could any evidence be introduced? Mr. Pennington is dead. I think that is very unfair argument". The court said: "The objection is sustained", and counsel for appellant continued his argument by stating that the burden of proof was on the plaintiff and that the jury would have to surmise that decedent came off the road on to the highway as there was no evidence where he came from and then inquired whether decedent could



have seen the car of the defendant and whether there was anything to obstruct decedent's view of defendant's on-coming car? At this point counsel for plaintiff again interrupted and stated that this was manifestly an unfair argument and inquired: "How can Mr. Pennington come up from the grave and refute this obviously unfair argument?" The court then directed Mr. Burek to proceed and counsel then referred to the testimony of Mr. Fitzner and argued that his testimony established the fact that decedent, Pennington, could see the car driven by defendant, McLean and then continued: "Certainly Mr. Pennington isn't here to testify but that is not a burden we have to assume". Counsel for plaintiff objected and the court said: "That part may be stricken".

Again during the argument, Mr. Burek, defendant's counsel said: "He (defendant) was driving 55 miles per hour with little traffic in front of him on a preferential highway down a hill. Would that be excessive and unreasonable speed with nothing in front of you?" Counsel for plaintiff again interrupted: "I am going to object to that part about nothing being in front of him. The truck was in front of him and he ran into it". The court stated: "This is argument counsel", and Mr. Burek continued by stating that the evidence disclosed that defendant was going down a hill and that it was "not a little hill". Counsel for appellee again interrupted and stated that counsel could not supply in his argument "something that isn't in the evidence". Mr. Burek then told the jury that he had been interrupted quite often during his argument and again counsel for appellee objected stating that he had an "obligation to the late Mr.

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Pennington's wife and two kids to interrupt him when he is doing anything wrong". The court sustained the objection.

Before concluding his argument counsel for plaintiff, after referring to the defendant and to his testimony with reference to the lights on the truck driven by decedent and the lights on his own car said: "I think in full justice to the man (defendant) and in fairness to him maybe the accident knocked him out. But if the tables were reversed here he would be arguing that maybe the man (defendant) didn't have any lights on his car". Counsel for defendant's objection was promptly sustained and the argument continued.

We have considered the arguments of counsel in their entirety as they appear in the record and have considered the cited cases where judgments have been reversed because of the misconduct of counsel in the argument of the case and considered others where an appellate court has declined to reverse.

Objections of counsel to the arguments as they proceed are addressed to the court and not to counsel. It is entirely proper for counsel to object to improper argument and to state the reasons for his objections but, as said in *Izerman v. Behn*, 9 Ill. App. 2d, 263, at p. 287, interruptions and statements by counsel for plaintiff during the argument of counsel for defendant, not addressed to the court but to opposite counsel are improper and serve no useful purpose. Illustrative of such remarks which appear in this record are these: "That is not the law."--- "You be fair in your argument, will you?"; "I am fearful of letting you finish anything, Mr. Burek, sometimes";





"You should not have asked the question"; "Anger is anti-social."; "Anger is destructive."; "How could any evidence be introduced? Mr. Pennington is dead".; "How can Mr. Pennington come up from the grave and refute this obviously unfair argument?"; "I have an obligation to the late Mr. Pennington's wife and two kids to interrupt when he (counsel for defendant) is doing anything wrong".

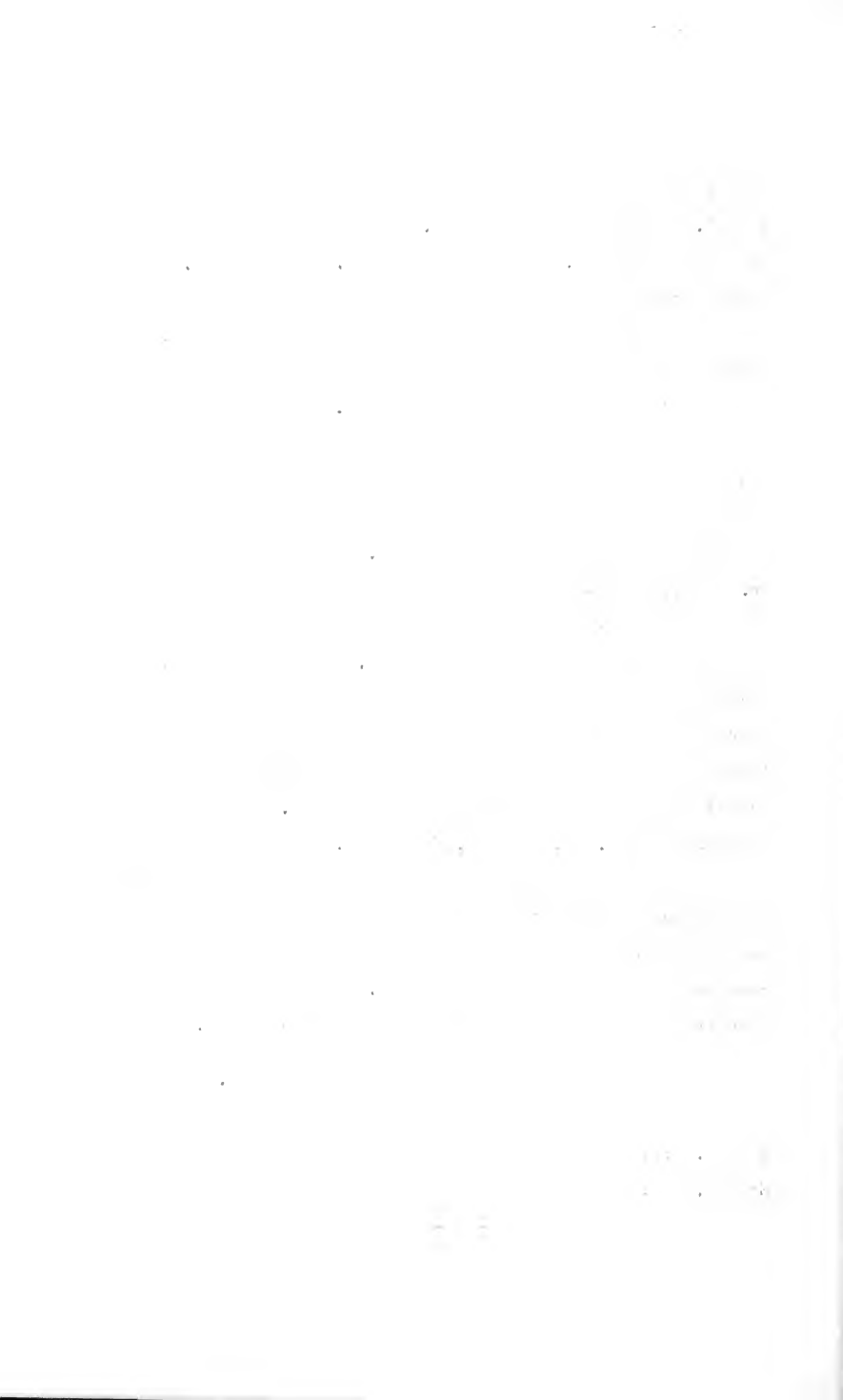
We do not approve of the repeated interruptions by plaintiff's counsel during the argument of the case by counsel for defendant nor do we approve of the statements of plaintiff's counsel directed to opposite counsel. Counsel's statement that Mr. Burek, counsel for defendant, was supplying in his argument something that was not in evidence was not justified and the remarks referred to were uncalled for. The trial court, however, in almost every instance, sustained the objections of counsel for defendant and instructed the jury to disregard these statements and where that is done the improper argument cannot usually be made the basis of reversal. (Appeal v. Chicago City Ry. Co. 259 Ill. 561, 567).

In the instant case a majority of this court are of the opinion that the conduct of counsel for appellee was not so prejudicial to defendant as to require the issues in this case to be submitted to another jury. The judgment of the Circuit Court of DuPage County is therefore affirmed.

Judgment affirmed.

SPIVEY, P.J. CONCURS

McNEAL, J. CONCURS



Abstract

NO. 11271

pg. 22

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, FIRST DIVISION  
FEBRUARY TERM, A. D. 1959

73 DIVISION

WILMA BURBECK,

Plaintiff-Appellant,

vs.

IRA RAPP,

Defendant-Appellee.

}  
} Appeal from the  
} Circuit Court,  
} Winnebago County

201A<sup>2d</sup>51

McNEAL, J. -

Wilma Burbeck brought an action against her landlord to recover damages for personal injuries sustained when a basement stairway collapsed. On the landlord's motion the trial court rendered summary judgment in bar of her action, and plaintiff appealed.

In her complaint Mrs. Burbeck alleged that the landlord, Ira Rapp, owned a two-family apartment building in Rockford, that she was a tenant in the building and in the exercise of due care, that defendant was negligent in permitting the stairs to become defective,-- in failing to maintain them in a safe condition and in failing to repair them when he knew, or by the exercise of reasonable care, should have known that they were defective and in a dangerous condition, and that as a result thereof plaintiff was injured. Mr. Rapp admitted that plaintiff was a tenant in the building, but denied the remainder of her complaint. Defendant's motion for summary judgment was supported by his affidavit and by depositions of Mrs. Burbeck and her husband. She filed a counter-affidavit.

From the affidavits and depositions it appears that Wilma Burbeck and her husband had lived in the first floor apartment for

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five or six years as tenants of Carrie Rapp, defendant's aunt. Carrie Rapp died on January 11, 1956, and defendant, Ira Rapp, then became the owner and entitled to possession of the building. Ira Rapp was a retired farmer whose residence was at Prophetstown, Illinois, but at the time of his aunt's death and on February 15, 1956, when plaintiff was injured, he was in Florida for the winter. He returned to Illinois in March. Ira Rapp was never on the premises and didn't meet Wilma Burbeck until April 2, 1956. He was never notified of any defect in the stairway until after the accident. In sustaining the motion for summary judgment, the trial court found that defendant had no notice of any defect in the stairway.

The stairway consisted of three or four steps down from the kitchen to a landing at the ground level, and other steps opposite an outside door there, leading from the landing to the basement floor. In her deposition Mrs. Burbeck stated that she used the stairway every day. She never noticed anything about the steps that appeared to be defective or that needed repairing. However, on February 15, 1956, when she was going down the steps from the landing to the basement, the third step from the bottom and the next two steps gave way and she was injured. It seemed to her that the steps gave a little or were weak sometime before the accident. She didn't tell Mrs. Rapp about the condition but her husband did. After Mrs. Rapp died, plaintiff was never in communication with Ira Rapp concerning the building. Her husband, Clarence Burbeck, in his deposition, testified that the steps gave way because a stringer had pulled away from the three lower steps, that although the steps above the landing were badly worn, there was nothing visible that appeared to be wrong with the stairway, that the lower steps were thick and solid and at no time gave him any concern as to their safety, that he never made a complaint either to Mrs. Rapp or to anyone else concerning the stairway, and that he didn't know defendant, Ira Rapp.

The sole issue for determination on this appeal is whether the pleadings, affidavits and depositions on file show the existence of any

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genuine issue of fact. The purpose of summary judgment procedure is not to try an issue of fact, but to determine whether one exists, and the affidavits and depositions should be construed strictly against the moving party and liberally in favor of the opposing party. Schumscher v. Fatten, 18 Ill. App. 2d 387, 390. If the pleadings, affidavits and depositions showed that there was no genuine issue as to any material fact,--no bona fide triable issue, then defendant was entitled to summary judgment as a matter of law. Sec. 57 (3), Ch. 110, Ill. Rev. Stat. 1957; Sterling v. City Nat. Bank & Trust Co., 17 Ill. App. 2d 340, 345.

Plaintiff does not contend that defendant had actual knowledge of the defect. She contends that " the essence of constructive knowledge is a conclusion that is inferred from facts as a result of interpretation", and may not be disposed of by a mere denial in defendants' affidavit. She refers to the decisions of this court in Smith v. Morrow, 220 Ill. App. 627, and 230 Ill. App. 382. In that case plaintiff's intestate was fatally injured when a railing at the outer edge of a porch on the third floor of an apartment building gave way. Defendant-landlord had been in the building and saw the railing on several occasions up to three or four weeks before the accident. He was present when the rail was put in place and probably knew of the manner the railing was constructed. The rail was not mortised into the corner post but was fastened by finishing nails toenailed into the post. The railing had been exposed to the weather for six years. It had been painted and the rotted end of the rail and rusted nails were not visible.

In the Smith case the facts pertaining to the landlord's opportunity to know of the defective condition of the railing and the circumstances which required him in the exercise of reasonable care to make an inspection to determine such condition are distinguishable from those in the instant case. Here, according to the facts and circumstances shown in the affidavits and depositions, Ira Rapp never saw the stairway and never had any reason to make an inspection of the

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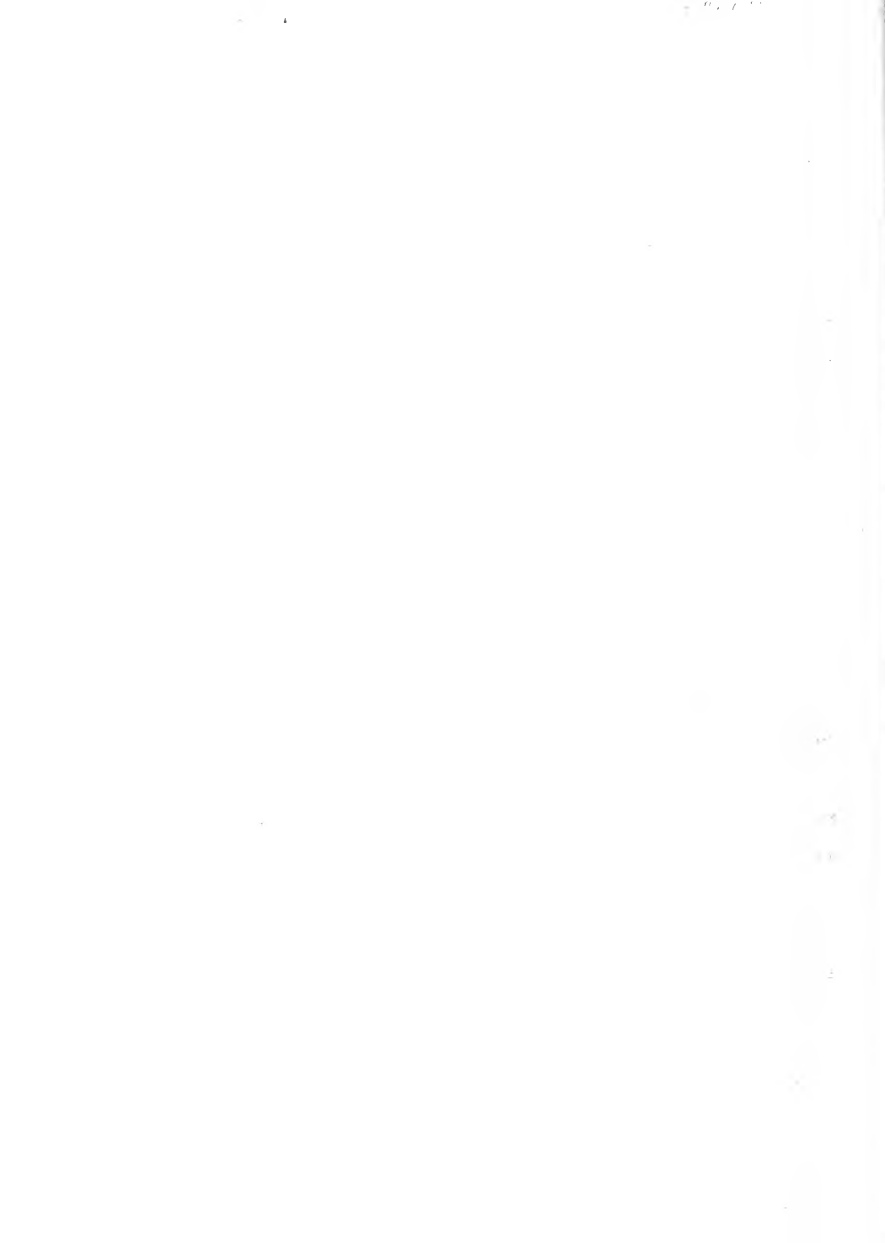
steps which collapsed. Mrs. Burbeck and her husband observed nothing in connection with the lower steps which appeared to be defective or needed repairing. Neither of them ever complained to anyone concerning the condition of the stairway. We cannot infer or interpret from the facts and circumstances shown here how Mr. Rapp could have had notice, either actual or constructive, of any defective condition in the stairway, when the persons who were using the stairs daily observed nothing which gave them any concern as to the safety of the steps.

There being nothing to show that defendant Rapp actually knew or had notice of any defective or dangerous condition of the steps which collapsed, he must be held liable, if at all, upon the ground that he failed to use ordinary care to discover the defective condition. Again as stated above, there was nothing observable from ordinary inspection indicating any defect. For all that appears in the affidavits and depositions here, defendant would have to have returned from Florida when he acquired the property from his aunt and taken the steps apart to have discovered the fault. This he was not required to do in the exercise of ordinary care. *Jackson v. First Nat. Bank*, 415 Ill. 453, 465.

We conclude that it is clear from all the facts and circumstances shown here that the defect in the steps which caused plaintiff's injury was a latent defect; that defendant Rapp had no knowledge or notice of the condition; and that he did not fail in his duty to use ordinary care to discover the defect. There is nothing in the affidavits and depositions, construed strictly against the defendant and liberally in favor of the plaintiff, tending to show negligence on the part of defendant Rapp, or any genuine issue as to any material fact, and the action of the trial court in entering summary judgment in his favor was in accordance with the law and facts shown. Therefore the judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

Spivey, P. J. and McNeal, J. Concur.



Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

May Term, A.D. 1959

General No. 10218

Agenda No. 3

In the Matter of a Petition to Detach  
Territory from Armstrong Township High  
School District Number 225, Champaign  
and Vermilion Counties, State of Illinois,  
and to Annex Same to Potomac Township High  
School District Number 229, of Vermilion  
County, State of Illinois.

# # #  
Armstrong Township High School District  
Number 225, Champaign and Vermilion  
Counties, State of Illinois, The Board of  
Education of Armstrong Township High School  
District Number 225 of Champaign and  
Vermilion Counties, State of Illinois,

Plaintiffs-Appellees,

vs.

County Board of School Trustees, Vermilion  
County, Illinois, Potomac Township High  
School District Number 229 of Vermilion  
County, State of Illinois, R. H. Ellicott,  
County Superintendent of Schools and Ex-  
Officio Secretary of the County Board of  
School Trustees, Vermilion County, State of  
Illinois, Lloyd Judy, Ruthal Judy, Laura  
Wernick, Charles Wernick, Gene King,  
Alburnise King, James R. King and Board of  
Education of Potomac Township High School  
District Number 229 of Vermilion County,  
Illinois,

Defendants-Appellants.

Appeal from the  
Circuit Court of  
Vermilion County

CARROLL, J.

The County Board of School Trustees of Vermilion County,  
allowed a petition filed pursuant to Sec. 4B-4, Chap. 122, Ill. Rev.

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Stats. 1955 and ordered certain territory detached from Armstrong Township High School District No. 225, Champaign and Vermilion Counties, and annexed to Potomac High School District No. 229 of Vermilion County. On administrative review the Circuit Court of Vermilion County reversed the order of the Board of School Trustees.

This appeal is prosecuted by the said Board of Trustees and the petitioners seeking detachment of the territory involved, (herein referred to as defendants), who contend that there is sufficient evidence in the record to support the decision of the Board of School Trustees and that the Circuit Court erroneously held to the contrary.

The procedure applicable to petitions for changes in boundaries of school districts and the duty of the county board of school trustees with respect thereto are set out in Art. 4B of the School Code. Sec. 4B-4 of said Article, (Chap. 122, Ill. Rev. Stats. 1955) in addition to requiring a public hearing on a petition to detach territory from one district and attach the same to another, provides as follows:

"...The county board of school trustees shall hear evidence as to the school needs and conditions of the territory in the area within and adjacent thereto and as to the ability of the districts affected to meet the standards of recognition as prescribed by the Superintendent of Public Instruction, and shall take into consideration the division of funds and assets which will result from the change of boundaries and shall determine whether it is to the best interests of the schools of the area and the educational welfare of the pupils that such change in boundaries be granted..."

It thus appears that the legislature has prescribed certain standards to which the county board of school trustees must conform in exercising its power to grant or deny a petition for a change in school district boundary lines.



If the evidence in the instant record is to be held sufficient to support the Board's decision, it must meet the requirements imposed by statute. Accordingly, in examining the evidence, we are concerned solely with the question as to whether or not it bears out the Board's contention that the boundary change ordered is in the best interests of the schools involved and their pupils as a whole.

The petition was signed by all of the legal voters residing in the territory in question which comprises 560 acres of land with an assessed valuation of \$77,510. and is all in the Potomac Grade School District. The Potomac High School District is an area of 51 square miles, has an assessed valuation of \$6,744.712 and a tax rate of 77¢ with no bonded indebtedness. The Armstrong High School District is an area of approximately 138½ square miles, has a fixed assessed valuation of \$22,352.086 and a total tax rate of about 55¢ with an outstanding bonded indebtedness of \$12,000. The record shows that all of the students from the territory described in the petition, although residing in the Armstrong High School District, have for many years attended the Potomac High School. Lloyd Judy, one of the petitioners, testified that one of his three children graduated from Potomac High School; that the other two children are attending Potomac Grade School; that their grade school classmates will all go to Potomac High School; that the Potomac bus goes by the witness's home but that the Armstrong bus does not do so. Charles Wernick testified that he lives four miles from Potomac and eight miles from Armstrong; that one of his children had been attending Potomac High School for three years; that under an agreement with the Potomac and Armstrong Boards', he had not been required to pay tuition for such child; that he has



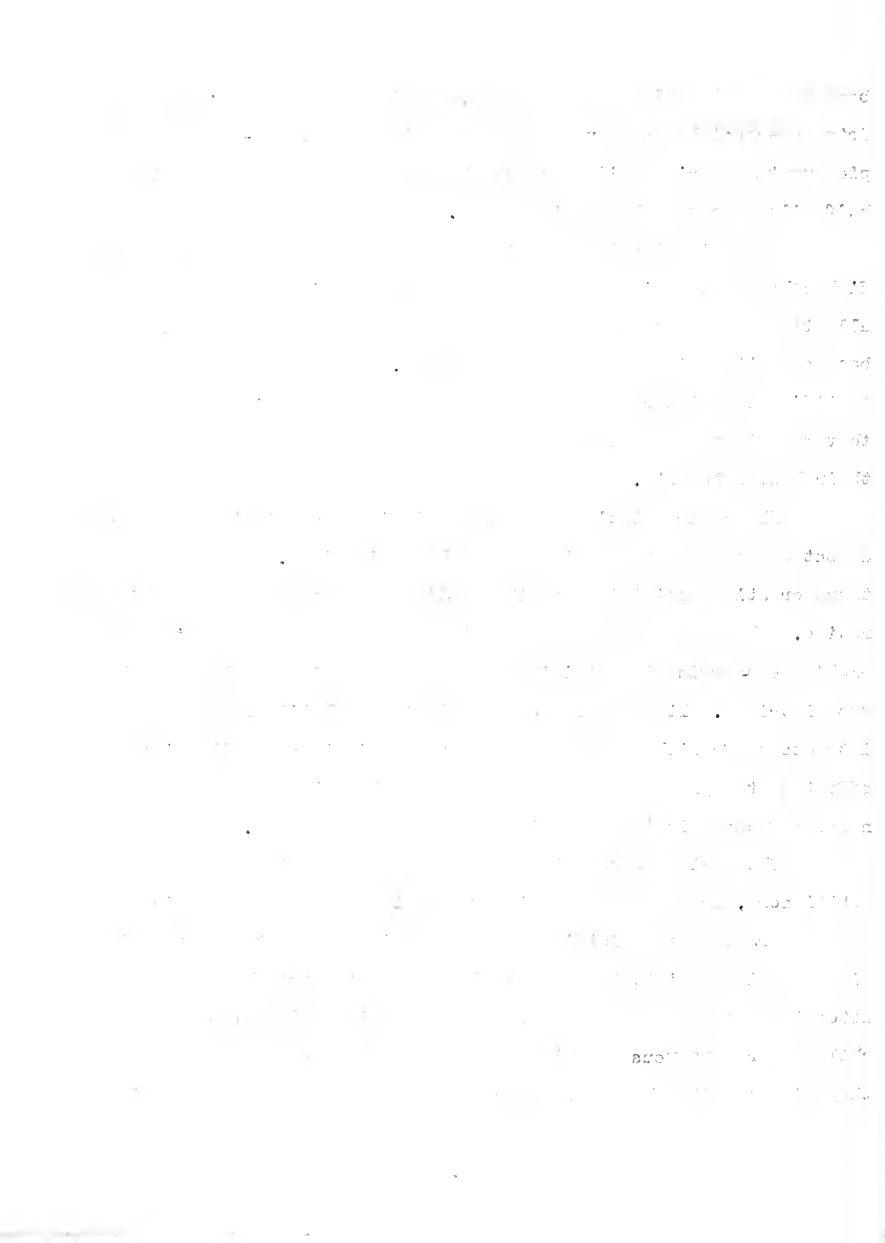


been told that during the next year, tuition must be paid; that the Potomac school bus goes up a lane for a distance of one-half mile to pick up the Wernick children; but they would be required to walk this half mile to catch the Armstrong bus.

Gene King testified that he had no children attending Potomac High School at the time of the hearing but that his three children had all attended and graduated from that high school and that this had been permitted without payment of tuition. Both Judy and Wernick testified that their children wanted to go to Potomac High School and that the witness felt that permitting the children to do so was for their best interests.

The record discloses no material difference in the educational advantages offered by the two high school districts. Both maintain transportation facilities for the pupils in the area where petitioners reside. The Board does not appear to have been confronted with any problem concerning the division of funds and assistance between the two districts. It therefore appears that the ability of the two districts to furnish adequate educational facilities and the financial effect of the proposed boundary change may be said to have been neutral factors in the determination made by the Board.

The facts conveyed to the Board by the testimony of the petitioners, are that the territory sought to be detached is in the Potomac Grade School District and is also in the Armstrong Township High School District; that the children from the area have been attending the Potomac High School without paying tuition; that the children are desirous of attending the Potomac High School where they will be with their former grade school associates; that their



desire has the sanction of their parents, which is indicated by their willingness to pay a higher tax rate resulting from the annexation of their land to the Potomac High School District.

The rule which must prevail in determining the sufficiency of the evidence in an administrative record to support a decision of the board of school trustees to change the boundaries of existing districts is found in numerous decisions of our reviewing courts. A recent statement thereof is found in Oakdale School District v. Trustees, 12 Ill. 2d, 190, where the Supreme Court said:

"Appellees emphasize the wishes and desires of the inhabitants of the territory detached; and they invoke the rule that an administrative order is binding unless manifestly against the weight of the evidence. It may safely be concluded that the petition, which was signed by more than two thirds of the voters within the particular territory in question, expresses the choice of its inhabitants. Indeed, only one of such residents objected at the hearing. But personal preference and convenience do not control, under the system in effect in this State. School boards have been given the power, within the limits of a reasonable discretion, to decide such questions for the parents. This power, however, is not an arbitrary one. Orders effecting a change of boundary must be made in conformity with the standards prescribed by the legislature and designed with an eye to the educational welfare of the children residing in all the territory to be affected. . .

"Although the consent of two thirds of the voters is required to initiate the proceeding, such consent is not sufficient to warrant the granting of relief. The statute contemplates such an order only if the division of funds and assets will not jeopardize the educational resources of existing districts and if the change will serve the best interests of the pupils in the entire area. School districts are not to be changed, therefore, solely by the shopping, banking or school preferences of those residing in particular segments thereof."



In Board of Education v. County Board, 19 Ill. App. 2d 196,

the court pointed out the reasons underlying such rule and made the following observation:

"There is absolutely nothing in the record to support the board's finding that the transfer would be in the best interest of either district or for the educational welfare of any pupils. Clearly to take area and revenue away from District 323 would cause some harm to that district. There is evidence in the record that the major part of District 321 was detached and established as District No. 323 in August 1954. Thereafter District 321 and District 323 embarked upon building programs, obviously with existing area, funds and population in mind. Any change in area, funds and population naturally disturbs in some measure such plans and programs. Aside from personal considerations suggested by the witness and petitioner, Richard Sarver, there is nothing which indicates to us that the proposed change would effect any educational improvements in the territories as a whole. On the contrary, changes in boundaries, however small in themselves, have the harmful effects to which we have just adverted. The legislature has seen fit to impose upon the board the duty of ascertaining before it acts the effect of its decision not only upon the particular territory described in the petition, but also upon the schools of the surrounding area.

"Unfortunately, in our modern system of education, with its complex revenue, transportation and other problems, it is not possible to permit every child or every parent to select the school district of which he may be a part. If there is to be some measure of stability in the boundaries of school districts, they cannot be changed for reasons of mere personal preference of the residents of the territory without regard to other material considerations."

Thus it has been made clear by our courts that school boards in exercising their discretionary power to alter the boundaries of existing districts, must be guided by the standards set up in Sec. 4B-4 of the School Code. As a salutary result of this requirement



a board of trustees is not permitted to arbitrarily change district boundaries, but may do so only where the evidence shows such change to be in the best interests of the affected districts and pupils thereof. Where there is a failure of proof as to these two essential factors, an order granting a detachment and annexation petition will not be permitted to stand.

In Trico Community, etc. v. County Board, etc. 8 Ill. App. 2d 494, a Fourth District Case, the petitioners offered evidence very similar to that appearing in the instant record. In evaluating the sufficiency thereof to justify granting a detachment petition, the court said:

"At the public hearing conducted by the board it was established that some of the territory proposed to be detached was closer to the Steeleville schools, that the courses of study in Trico and Steeleville were identical, that Steeleville has remodeled one school and has built a new grade school building, that it has adequate bus service for all students, including parochial, and that the residents of the disputed territory did most of their trading, selling of produce and banking in Steeleville. Certain residents of the affected areas also advanced their reasons for favoring the change. Some thought that the bus service provided by Steeleville was superior to that of Trico and would, in at least one case, relieve a child of walking one and one-half miles to catch a bus. Others pointed out that the elementary school at Percy, a Trico unit, unlike the elementary school at Steeleville, did not have a definite hot-lunch program in operation. The same witnesses also expressed the sentiment that their children had friends, and would be happier at Steeleville. The majority of the persons testifying, however, gave as their primary reason, the fact that their children were attending an elementary parochial school in Steeleville. They felt, not only that it would be better for their children, upon graduation from the parochial school, to go directly into Steeleville High School along with their classmates, but also that the annexing district would furnish free bus transportation for these parochial students.

"When such evidence is measured by the statutory standards, we find it insufficient to support the decision of the board. . .





Neither is such a change necessary for the educational welfare of the children residing in the affected territories. The petitioners do not seriously contend that the curriculum and educational opportunities offered by either district is superior to that of the other. Rather, they urge such action primarily for the sake of personal preference and convenience. It may well be that certain of the children, if allowed to choose, would prefer the Steeleville District. Unfortunately however, in our modern system of education with its complicated revenue and transportation problems, such choice is not always possible. If it were, the well-planned procedure for the establishment and stability of school boundaries would be for naught."

When the evidence in this record is tested by the standards prescribed by the statute from which the Board's authority is derived, we think it must be held insufficient to support the decision reached.

Defendants rely principally upon Bridgeport/Township High School District v. Shank, 7 Ill. App. 2d 183, also decided by the Fourth District.

In that case there was evidence before the Board of Trustees showing that the Sumner District to which annexation was sought had a new school building with facilities for double its then present enrollment and that attendance at the Bridgeport district which opposed the petition, would require about 12 miles additional travel per day for pupils from the petitioning areas.

It was also shown that under an agreement which had been in existence for some time, children from the petitioning areas while living in the Bridgeport District, chose to attend the Sumner High School. The court observed that this evidence was of significance in passing upon the question as to the educational welfare of the children involved; that it could not be assumed that their education was neglected by reason of their attending Sumner High School because the existence of such situation would not have been permitted by the

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boards of the two districts. The court then concluded that the order granting the detachment petition was supported by substantial evidence.

The record in the instant case clearly indicates that the question of the ability of the Armstrong District to meet the requirements essential to the educational welfare of the children of the petitioning area was not raised upon the hearing before the Board. The only reason for the proposed annexation of the area in question to the Armstrong District as shown by the petitioners' evidence is their wish and desire to have their children attend that particular high school. The decision in the Bridgeport case is not applicable in such situation.

The judgment of the Circuit Court of Vermillion County is affirmed.

Affirmed.

REYNOLDS, P.J. and ROETH, J., concur.

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STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10215

Agenda No. 1

People of the State of Illinois,	)	
	)	
Plaintiff-Defendant in Error,	)	
	)	Error to Circuit Court
vs.	)	of Champaign County
	)	
Harold F. Fields,	)	
	)	
Defendant-Plaintiff in Error.	)	

ROPTH, Justice.

A writ of error was sued out of this court to review an order revoking the probation of plaintiff in error (hereinafter referred to as defendant) and sentencing him to the penitentiary. At the September 1952 term of the Circuit Court of Champaign County, defendant was indicted for the crime of burglary. On June 5, 1956, he entered a plea of guilty to this charge and upon his plea was adjudged to be guilty of burglary as charged in Count 1 of the indictment. On the same day he was admitted to probation for a two year period. Although the probation order does not so show, it appears from the record, that at the time he was admitted to probation he was living in Florida, and permission was granted to do his probationary term in Florida.

Abstract

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On March 4, 1958, the probation officer of the Circuit Court filed a written motion to revoke defendant's probation, the ground assigned being that defendant had violated the laws of Illinois in that he committed the crime of armed robbery during the period of his probation. The events which followed give rise to defendant's two contentions before this court, (1) that he was denied a fair hearing and (2) that action of the trial judge in revoking probation was arbitrary and an abuse of discretion.

At the outset we are familiar with certain rules governing the disposition of matters of this kind. A defendant who is charged with violations of the conditions of his probation is entitled to know the charges against him and to a hearing. Such hearings should be in accordance with well recognized and established procedures. People vs. Burrell, 334 Ill. App. 253, 79 N.E. 2d 88; People vs. Enright, 332 Ill. pp. 655, 75 N.E. 2d 777; People vs. Kostaken, 16 Ill. App. 2d 395, 148 N.E. 2d 615. In commenting on its holding in People vs. Burrell, supra, the Appellate Court of the First District had this to say in People vs. Kostaken, supra:

"A probationer is not in the same category as one charged by indictment or information. (Annotation in 54 A.L.R. 1471, 1483 and in 29 A.L.R. 2d 1074, 1108) because he is free by clemency of the court which has conditionally postponed his sentence provided he faithfully fulfill the requirements of probation which are imposed by statute. Ill. Rev.





Stat., Chap. 38, Par. 787. It is true that this court has held that a probationer is entitled to a fair hearing in determining whether or not he has violated a condition of his probation. People v. Burrell, supra, 334 Ill. App. 256, 79 N.E. 2d 89. This court, however, did not attempt to place the probationer in the same position as one accused by indictment even though the condition alleged to have been violated is the commission of another crime. Thus this court in the Burrell case held that the State need not establish that the defendant has violated a condition of his probation beyond a reasonable doubt. People v. Burrell, supra, 334 Ill. App. 256, 79 N.E. 2d 89."

Further, the law is, that revocation of probation is a matter within the discretion of the trial court, and the appellate Court is not warranted in disturbing the judgment thereon unless it appears that the trial court acted arbitrarily or abused its discretion. People vs. Beard, 349 Ill. App. 465, 110 N.E. 2d 878; People vs. Koning, 18 Ill. App. 2d 119, 151 N.E. 2d 103. With these principles in mind we proceed to examine the record.

Upon the filing of the motion to revoke defendant's probation, the court ordered the probation revoked and directed a warrant to issue for him. This was in accordance with the provisions of Par. 789 of Chap. 38, Illinois Revised Statutes 1957. The record shows that on March 12, 1958, the defendant was present in open court, as was the States Attorney, and by agreement the petition to revoke defendant's probation was set for hearing on March 24, 1958. On March 24, 1958, the hearing on the petition

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was commenced. The defendant was present in open court. The court announced the purpose of the hearing and inquired whether the parties were ready to proceed. No objection was made by the defendant to proceeding with the hearing. Five witnesses were examined by the States Attorney and at the conclusion of each examination the court inquired of the defendant whether he had any questions to ask of the witness and he replied "no". The court then inquired of the defendant whether he had anything to say, whereupon defendant addressed the court and in a colloquy that ensued between defendant and the court, he for the first time advised the court that he was under the impression that Mr. C. E. Tate, an attorney, had agreed to represent him but was on vacation, a fact which he knew on March 12, 1958, and that he had witnesses he would like to call in his behalf. At this point the States Attorney advised the court that he had called the office of Mr. Tate and had been advised that Mr. Tate had not been employed for the hearing. Thereupon present counsel for defendant, Robert C. Summers, who was one of the counsel who had represented him on his original plea of guilty, came forward and offered his services to defendant and advised the court that he would procure defendant's witnesses if given time and that he would like to confer with the defendant. The court granted the request for a conference, after which the defendant took the

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witness stand and was examined by his present counsel. At the conclusion of defendant's testimony the hearing was, on motion of defendant's counsel, continued to March 29, 1958.

On March 28, 1958, prior to resumption of the hearing the States Attorney, over objection of defendant's counsel, secured leave of court to file an amended petition for revocation of probation. The amended petition charged defendant with a violation of the laws of Illinois in that he had committed armed robbery, vagrancy and fornication and had been in Indiana and Kentucky without permission of the court and had made false reports to the probation officer. The procedure in granting leave to file the amended petition has been approved in People vs. Kuduk, 320 Ill. App. 610, 51 N.E. 2d 997. The hearing was then resumed and three witnesses were examined by the States Attorney and cross examined by defendant's counsel. At the conclusion thereof the hearing was continued by agreement until April 18, 1958.

At the hearing on April 18, 1958, additional witnesses testified on behalf of the People and were cross examined by defendant's counsel, and the defendant again took the witness stand in his own behalf. No other witnesses testified on behalf of defendant.

Counsel for defendant contends that the foregoing presents a parallel case to that of People vs. Burrell, supra. We think

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otherwise. In People vs. Burrell the defendant was brought into court and charged with a violation of the conditions of probation. The evidence was all heard the same day and the order revoking probation was entered the following day. The Appellate Court apparently felt that he should have been given an opportunity to secure counsel and this is the basis for the decision. In the case at bar defendant was given a 12 day period within which to secure and have counsel present. When the hearing commenced no objection was originally made by the defendant to proceeding with the hearing without counsel. When the lack of counsel was first raised the court recessed the proceeding to give defendant an opportunity to consult with his former counsel who was in the courtroom. Continuances were subsequently granted on defendant's motion or by agreement to give him a full opportunity to produce witnesses in his own behalf. Suffice it to say that none were produced. Three of the five witnesses who testified, before Robert Summers reentered the case as defendant's counsel, were again called to the stand to testify and full opportunity was given defendant's counsel to cross examine. There was never any request by counsel for defendant to require production of the other two witnesses to permit cross examination. Notwithstanding the abstract furnished, which incidentally undertakes to present

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the procedural aspects of this case in a light more favorable to defendant than is warranted, we have examined the record itself. We are convinced that defendant was accorded a full and fair hearing and that his first contention is without merit.

So far as the second contention is concerned the record discloses that the following facts were before the trial judge. Defendant was admitted to probation with permission to live in Florida. He returned to Illinois from Florida in 1957 and went to live with his mother in Marshall, Illinois. Subsequently he left the State of Illinois to live in Indianapolis without permission of the court. From there he returned to Marshall and from there went to Cairo to live. There is evidence in the record that defendant, in company with a girl friend, rented an apartment in Cairo under the name "Anthony Mills" and lived there for approximately 4 months. Defendant denies the rental under a fictitious name or that he and the girl friend ever lived there at the same time. Defendant admits that he subsequently left the State of Illinois to go to Kentucky without prior permission.

In the early morning of February 27, 1958, an armed robbery took place in the Thunderbird tavern in Alexander County. Subsequently on the same day defendant was arrested on two warrants issued by a Justice of <sup>the</sup> Peace of Alexander County, one charging vagrancy and the other armed robbery. Following his arrest and



on the next day he was identified in the presence of two deputy sheriffs by two persons, as being one of the individuals who took part in the robbery. According to the deputy sheriffs who testified on the hearing, the defendant upon being identified said nothing. One of the persons who identified defendant in the presence of the two deputy sheriffs, testified on the hearing and at first, again positively identified the defendant. He later qualified his testimony, for the reason, as he explained, that he had received threatening phone calls. On the hearing in the trial court defendant denied any participation in the Thunderbird tavern robbery or that he was in the vicinity at the time of the occurrence. Before the Justice of/Peace who issued the warrants, defendant was subsequently arraigned on the vagrancy charge, signed a waiver of jury trial, pleaded guilty, was found guilty of vagrancy and paid a fine of \$100.00 and costs. This he denied on the hearing although the Justice of/Peace produced the court records to show this fact and defendant admits being before the Justice of/Peace. On several reports which he made to the probation officer, in response to a question as to whether or not he owned an automobile he answered in the negative. The record shows that at the time these reports were made he was the registered owner of a 1954 Cadillac and that license plates

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had been issued to him. Defendant denied that he owned the car and undertook to explain these facts by saying that his girl friend actually owned the car and that he had taken title as an accommodation to her.

There can be no question under the record before us that defendant left the State of Illinois to go to Indiana and Kentucky without prior permission of the court which granted him probation. Defendant makes no claim to the contrary. By leaving the State of Illinois, in this regard petitioner violated his probation. Such acts in and of themselves operate as a termination of probation. People ex rel Holzapple vs. Regen, 2 Ill. 2d 124, 117 N.E. 2d 390. There can be little doubt of his conviction of a misdemeanor when he pleaded guilty to the charge of vagrancy.

As to his involvement in the Thunderbird robbery, his fornication in Cairo, and the false reports to the probation officer, the question of whether there was convincing proof of his guilt of these acts would depend upon who the trial judge believed. We cannot hold upon the basis of the entire record before us that the trial judge abused his discretion or acted arbitrarily.

Accordingly the judgment of the Circuit Court of Champaign County will be affirmed.

Affirmed.

Reynolds, Justice, and Carroll, Justice, concur.



47635

MATTHEW BONNEMA,

Plaintiff-Appellee,

v.

DECATUR CARTAGE COMPANY, a  
corporation, and ARTHUR C.  
OLDENBURG,

Defendants-Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

202A-257

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in the Superior Court of Cook County in favor of the plaintiff for damages resulting from a highway collision.

Appellants contend that appellee was guilty of prejudicial misconduct in making, during his opening statement, inflammatory remarks and assertions of fact, which were unproved, concerning the war record of the plaintiff. The comment complained of was:

"He broke both of his legs during World War II as a paratrooper but he made many jumps since then in Africa, Belgium, Anzio Beachhead, and various places. He made a full recovery so far as his broken legs were concerned, Since this accident --"

The trial court has the ability, by prompt and emphatic action, to correct a great variety of errors which would otherwise require a mistrial. See I.L.P., Trial, §97, 544-547 and the cases there cited. However we believe that the improper opening statement in this case remained fatally prejudicial despite the curative actions of the trial court. The conference outside the presence of the jurors and the indirect





references to the improper assertion made in their presence, could not dispel from their minds the false impression originally placed there by plaintiff's opening statement. That statement was such a one as left an indelible impression on the minds of the hearers while its accuracy and relevancy was unknown. At the end the court tried to correct the error, but it was unable to do so.

In Colmar v. Greater Niles Twp. Pub. Corp., 13 Ill. App.2d 267, both a general and an explicit instruction were given to the jury ordering them to disregard an improper opening statement. Counsel for the plaintiffs also told the jury in his closing argument to disregard his earlier remarks. Mr. Justice Burke said, at page 273:

"In McCarthy v. Spring Valley Coal Co., 232 Ill. 473, the attorney for the plaintiff who was injured while working in defendant's coal mine made a statement to the jury in his opening statement concerning the size of plaintiff's family. The objection to this was sustained by the trial court. In ordering a new trial the Supreme Court said (479): 'The fact once lodged in the minds of the jury could not be erased by an instruction, and appellee by this statement secured the benefit of the fact to the same extent as if he had introduced evidence to prove it. . . . It is impossible to tell the effect, on the verdict, of the impressions wrongfully conveyed to the jury's mind by the improper conduct of counsel.'

The verdicts in the instant case are for substantial amounts. In view of the nature of the case it is unlikely that the impression conveyed to the jury in the opening statement could be removed by the statements of counsel or the instruction. The statement deprived the defendant of the fair trial to which he was entitled."

In the case at bar, the opening statement of the plaintiff was manifestly improper. The only purpose to which



-3-

the jury could have put the information about the injuries incurred as a paratrooper and the continued heroism during and after recovery, was an an enhancement of the damages to be awarded.

We are of the opinion that none of the corrective measures employed by the trial judge had the effect of eradicating the false impression left in the minds of the jurors by the improper statement.

For the reasons indicated, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED  
FOR NEW TRIAL.

BURKE and FRIEND, JJ., CONCUR.



47617

In the Matter of the Estate of  
JOHN S. PALUCH, Deceased.

Claim of THE QUEEN'S WORK, a  
Missouri Corporation Organized  
Not for Profit

THE QUEEN'S WORK, a Missouri  
Corporation Organized Not  
for Profit,

Appellee,

v.

GRACE KOLLMAYER, GENEVIEVE LYNCH  
and J. NORMAN GODDESS, Executors  
of the Will of JOHN S. PALUCH,  
Deceased,

Appellants.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

25 I.A. 230

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Following the death of John S. Paluch in 1955, on July twenty-seventh of that year letters testamentary were issued by the Probate Court of Cook County to respondents Grace Kollmeyer and Genevieve Lynch as co-executors of his will. Thereafter, on April 27, 1956, the last day within the nine-month period for filing claims against decedent's estate, The Queen's Work filed a claim in the amount of \$6755.02 against the estate. The Probate Court allowed the claim as filed; respondents appealed, and trial de novo in the Circuit Court resulted in an order allowing the claim in the same amount, as a seventh-class claim. Respondents appeal from that order.

The essential facts disclose that decedent was the president and principal shareholder of J. S. Paluch Co., Inc., a corporation located in Chicago and engaged in the business of



printing and publishing religious publications. It sold its publications to more than 5000 churches.

The claimant is a not-for-profit corporation organized in Missouri. Father Fred L. Zimmerman was its managing director in 1952, and at the time of the trial its president. The principal business of the corporation is the printing and publishing of religious books and pamphlets which are sold throughout the United States through various outlets.

A son of the deceased, Joseph Paluch, was the sole proprietor of an organization in Chicago conducted under the name of Catholic Literature Distributors, which he launched in 1946. Its business also consisted of the sale of religious books and pamphlets. Some time in 1951 or 1952 Joseph Paluch went to St. Louis, Missouri to contact Father Zimmerman with respect to claimant's providing Catholic Literature Distributors with pamphlets and booklets for resale in Chicago, and thereafter claimant shipped various religious pamphlets and booklets to Catholic Literature Distributors on the order of Joseph Paluch. Father Zimmerman had all his dealings directly with Joseph Paluch. In the course of the proceedings Joseph Paluch became delinquent in his payments for merchandise furnished to him, and by November 1952 was in arrears to the extent of \$4068.95 on merchandise purchased from The Queen's Work and delivered to him for the sole proprietorship of Catholic Literature Distributors. Prior to November 1952 Joseph Paluch likewise became heavily indebted to J. S. Paluch Co., Inc., his father's concern, as well as to unidentified persons. Sometime prior to November 19, 1952 a letter was mailed on the letterhead of Catholic Literature





Distributors to its various creditors, including claimant and J. S. Paluch, Inc., proposing various ways of disposing of its delinquent accounts. However, nothing came of these various attempts to reorganize Catholic Literature Distributors, and on November 19, 1952 John S. Paluch wrote a letter on the letterhead of his company to Father Zimmerman of The Queen's Work. Because this letter embodies the controlling question at issue, we quote it in full:

Dear Father Zimmerman,

I am writing to you as a creditor of Catholic Literature Distributors. I am the principal shareholder of J.S. Paluch Co., Inc., who is one of the largest creditors of CLD. I am also father of Joseph Paluch, who has operated CLD as a proprietorship.

I know that, as a creditor, you received the same letter that I did, on the stationery of CLD, which proposed various ways of how and when the delinquent accounts would be cleaned up. Nothing came of these various attempts to reorganize CLD.

I came to the conclusion that something had to be done without delay, or else the business would have to close its doors. Until I was able to determine a concrete plan of action, I had no alternative but to finance the business to the extent of \$2,000, for immediate operating capital. In the last two months, the business has been under my close supervision. My experience has convinced me that with proper management, the business can prosper and take its rightful place as a foremost distributor of Catholic Literature.

I propose to continue to maintain close supervision of buying, advertising and making all decisions which are related to the operation of the business. I particularly want to build up the business to the point where the current profits will be sufficient to begin to liquidate the past accounts. Until the old accounts are paid, no money will be withdrawn in liquidation of the money to my printing company.

In order to accomplish this, I will require the cooperation of CLD's principal creditors. I propose



to personally guarantee payment of all new bills within 60 days after receipt of invoice, in return for which I ask that the creditors do two things: (1) extend a reasonable line of credit to CLD on my personal guarantee, and (2) forbear pressing for collection the past due account, on my statement that all profits will be utilized to pay creditors on a pro rata basis, excepting, of course, that there will be no distribution to my company until all other creditors are paid. So far as future purchases are concerned, I am not asking you to take any financial hazard whatsoever. My company is firmly established and its credit references can easily be ascertained. My company has a publication business of its own and more than 5000 churches now purchase one or more of our publications. I believe that under the new arrangement, CLD will require more and more of your publications and that future dealings will be of mutual interest and benefit.

I would like to have some expression from you on the matters discussed in this letter. I am now called upon to make a further advance to CLD, which I am prepared to do because I have confidence both in the business and in my son's ability to develop it to its fullest potential. I hesitate to commit myself still further unless I have some assurance from CLD's principal creditors that they see the matters as I do and that they are willing to cooperate with me along the lines I have expressed.

Respectfully, I ask that this matter be given your immediate consideration, inasmuch as the financial decisions before CLD are such that delay will prove harmful for all of us. I shall welcome your questions and comments.

Sincerely,

JOHN S. PALUCH

In Answering This Letter Address It To  
John S. Paluch  
Special Correspondence and Editorial Dept.  
4429 Leland Ave. Chicago 30, Illinois

The following day, November 20, 1952, Father Zimmerman, in answer to the letter, assured John S. Paluch that The Queen's Work was satisfied to go along with his plan. The next day John S. Paluch wrote Father Zimmerman, on the stationery of J. S. Paluch Co., Inc., thanking him for claimant's acceptance of the proposition,



and asking that no merchandise be shipped unless the order had been approved by John S. Paluch or Mr. Dickinson of J. S. Paluch Co., Inc.

After accepting the plan proposed in the letter of John S. Paluch under date of November 19, 1952, claimant separated the debt accumulated by Joseph Paluch up to that date from debts incurred on new orders. On trial, Father Zimmerman testified that "Mr. John Paluch asked us to go into a different arrangement on these orders" and said that "he would guarantee all future orders and that the invoices would be paid within sixty days of all future orders and he asked us in another letter that that order always be accompanied by his okay or someone else's okay." Thereafter, between December 15, 1952 and May 9, 1953, claimant delivered goods on consignment to Catholic Literature Distributors in the total amount of \$5016.16, and during this same period it received payments in the amounts, respectively, of \$781.35, \$805.17, \$587.87, \$621.69, and \$873.31, representing payments of specific invoices for certain merchandise delivered after November 15, 1952. In August 1953 claimant received a check from John S. Paluch in the amount of \$700.00. Without communicating with John S. Paluch, claimant applied this check on its books against the indebtedness owed by Joseph Paluch prior to November 1952, and there is no evidence to show that claimant ever advised John S. Paluch that it had so applied this payment. The balance due on shipments between December 15, 1952 and May 9, 1953, after giving credit for the \$700.00 payment, was \$646.77.

Other than the receipts for invoices, the first correspondence



-6-

or communication that Father Zimmerman had with John S. Paluch after November of 1952 was on August 28, 1953. On that date Father Zimmerman received the following letter from John S. Paluch as president of the corporation.

Dear Mr. Zimmerman:

Mr. Joseph F. Paluch has arranged to assume proprietorship of Catholic Literature Distributors and for that reason I ask that you cooperate with him.

I have been informed that capital is available to bring C.L.D. affairs to a current basis and for that reason, propose that you furnish me with a release from liability in this regard.

Sincerely yours,

J. S. PALUCH CO.  
(s) JOHN S. PALUCH,  
President.

No reply was made to John S. Paluch or to the corporation.

In either August or September of 1953, Joseph Paluch called on Father Zimmerman and requested him to relieve John S. Paluch of any further obligation under the agreement of November 1952, assuring him that financial arrangements would work out this time and that claimant would be paid; at the same time, he requested additional credit. Later, between October 14, 1953 and April 15, 1954, claimant sold merchandise to Catholic Literature Distributors on consignment totaling \$2039.28, after allowance of credit for returned merchandise. No payments were ever received for these consignments. Several months prior to September of 1954 claimant was informed that Joseph Paluch's business had failed, and on September 28, 1954 Father Zimmerman wrote John S. Paluch the following letter:

Dear Mr. Paluch:

I am writing what I consider a very difficult letter.  
For a number of years we have had dealings with your son





and with you in the pamphlet distributing business. Several times during these transactions your son became ill, and you more or less supervised the handling of the business. On one occasion you advised me that you would underwrite any outstanding debts incurred by your son, but you wanted to approve all purchases before we shipped the material. This arrangement was carried out for some time. Then your son came to St. Louis, requesting us to relieve you of that obligation and to grant him some additional credit. He assured us that things would work out this time and that we would be repaid. I understand you were aware of this transaction, and approved it. Some months ago we were informed that your son's business had failed. We received a large shipment of material from Chicago, much of which was damaged.

You understand, Mr. Paluch, that we are a non-profit organization. We still have a large debt on this building. Any profit we make goes back into the promotion of Catholic Action in the Sodality.

We allowed your son to run his account up to five thousand dollars and then we stopped. He has returned a considerable amount of material, which was deducted from this bill, but so much of it was damaged and rendered unsalable that we could not give him credit for everything. I have our accountant working now to determine just how much of a loss we suffered on this transaction.

I am writing you to find out whether or not you are willing to do anything about this debt. At one time you stood behind your son and assured us you would make good any bills he owed us. Does this still hold, or was this last maneuver of his a device on his part to free you of any responsibility in the case. I do not believe it was, but I was somewhat surprised to learn he was dissolving the business so soon after he asked us to liberate you from any responsibility.

You know your son better than I do, but I want to assure you a loss of this kind would hamper our promotional work very seriously. I shall be waiting to hear from you.

Very sincerely yours,

F. L. ZIMMERMAN, S.J.  
Managing Director

This was the first communication that Father Zimmerman had addressed to John S. Paluch since his letter of November 20, 1952.



On October 5, 1954 John S. Paluch wrote Father Zimmerman the following letter on the stationery of his corporation:

Dear Father:

I wrote several letters in answer to yours of the 28th of September and threw them all away. You say you had a difficult time writing me then how difficult do you think it is for me who tried to save all from losing anything and from having the name go through all this mud and the losses also, this didn't have to be.

Let's stop and not say anything more in any letters, both of us I mean. However I would very much like to meet you to show you we are also good honest people and doing about the same work as is "The Queen's Work" with which you are affiliated.

I suppose you do come to Chicago once in a while and I would like to have [sic] meet us, that is my son Chester who is now the manager, myself and some of the rest of us. Because I don't know about my health from day to day my doctor would not give me permission to travel right now so I cannot come to St. Louis. Call me next time you [sic] in Chicago Father and see what we can arrange.

Sincerely,

JOHN S. PALUCH

After October 5, 1954, the only communication, oral or written, between Father Zimmerman and John S. Paluch, was in 1955, a few months before the latter's death. Father Zimmerman had telephoned and made arrangements to come to Chicago to see John Paluch. He could not come immediately, and when he did arrive it was the day of John Paluch's funeral.

The claim against decedent's estate filed within the nine-month period is as follows:



THE QUEEN'S WORK  
3115 South Grand Blvd., St. Louis 18, Mo.

John S. Paluch  
Chicago, Ill.

.....

Amount \$ 6,755.02

Terms--Net 30 days

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Balance due on May 31, 1954

Religious Pamphlets & Booklets 6,755.02

That claim was set for trial in the Probate Court on June 29, 1956. On that day claimant produced for the first time the alleged guaranty contained in the letter of November 19, 1952.

Claimant takes the position that decedent, in expressing his undertaking as to the payment of bills as set forth in the letter of November 19, 1952, used language permitting claimant to reasonably infer that decedent obligated himself to pay past-due bills; that the written guaranty was ambiguous; and that its meaning could be determined only from extrinsic evidence, including subsequent communications between the parties. The court evidently adopted this contention, and in its view the extrinsic evidence supported claimant's theory of the case; the court held decedent's estate liable not only for the cost of the merchandise ordered by Catholic Literature Distributors between November 19, 1952 and August 28, 1953 but also for the indebtedness of the organization incurred before and after that interim period. Section 1 of the Statute of Frauds provides that no action shall be brought to charge the defendant



upon any special promise to answer for the debt of another unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith or his agent (Ill. Rev. Stat. 1957, ch. 59), and it has been held that the writing, in order to meet the requirements of the statute, must express the substance of the contract with reasonable certainty (*Frazer v. Howe*, 106 Ill. 563). More recently, in *Bruner v. Wolford*, 356 Ill. 514, the court held it to be the rule respecting the construction of guaranties "that the guarantor will be accorded the benefit of any doubt arising from the language of the contract of guaranty. Such language must be construed strictly and may not be extended by implication or otherwise beyond its precise terms." This rule of strict construction is reiterated in the following cases: *Baker v. Peterson*, 300 Ill. 526; *Alexander Lumber Co. v. Aetna Co.*, 296 Ill. 500; and *Allied Coal & Mining Co. v. Andrews*, 318 Ill. App. 415.

We think the purported guaranty of November 19, 1952 was written in clear and unambiguous terms and is not susceptible of various or alternate interpretations. In the agreement John S. Paluch personally guaranteed the payment of all new bills within sixty days after receipt of invoices; in return for this guaranty he asked the creditor to "do two things": (1) to extend a reasonable line of credit to Catholic Literature Distributors, and (2) to forbear pressing for collection the past-due account "on my statement that all profits will be utilized to pay creditors on a pro rata basis, excepting, of course, that there will be no distribution to my company until all other creditors are paid."





He further stated in his guaranty: "So far as future purchases are concerned, I am not asking you to take any financial hazard whatsoever. My company is firmly established and its credit references can easily be ascertained. . . . I believe that under the new arrangement, CLD will require more and more of your publications and that future dealings will be of mutual interest and benefit." It thus appears that decedent, in his letter of November 19, 1952, by its terms, expressly and precisely stated a guaranty of payment of all new bills; and in the same letter he distinguished past-due accounts, as to which he clearly offered no guaranty but, rather, asked forbearance of the creditors. It would seem that Father Zimmerman clearly understood the guaranty, for he stated in his reply of November 20, 1952: "We have confidence in your plan bringing us eventual payment of your account and also new business. We are perfectly willing to go along with you and deliver goods on the 60-day basis." Moreover, it appears that claimant understood from the outset that all that was guaranteed was payment of new bills, and that payment of the debt accumulated by Joseph Paluch prior to November 19, 1952 was dependent upon improvement in the business, for Father Zimmerman testified: "Well, that's the cumulative account [the column carried as Balance Accounts Payable] that was owed up to that date--it's indicated there--and after the letter from John S. Paluch, we separated the . . . old debt from the current debts. Mr. John Paluch asked us to go into a different arrangement on these orders and [stated] that he would guarantee all future orders and that the invoices would be paid within sixty days of all future orders and he asked in another letter that



the order always be accompanied by his okay or someone else's okay. Clearly the only purpose to be served by separating the old debt from the current debt was to separate new bills (incurred after November 19, 1952), to which the guaranty extended, from the pre-existing indebtedness of Joseph Paluch, on which there was no guaranty; and it would seem that the separation of accounts is completely inconsistent with claimant's present contention that the guaranty included the pre-existing indebtedness of Joseph Paluch. The evidence adduced by claimant failed to establish any obligation on the part of anyone to pay debts of Joseph Paluch other than a balance of \$646.77 due on goods sold to Joseph Paluch between November 19, 1952 and August 28, 1953.

Claimant is entitled to the allowance of its claim only to the extent of \$646.77. Accordingly, the judgment of the Circuit Court is reversed, and the cause remanded with directions that the claim be allowed in that amount.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

BRYANT, P. J., and BURKE, J., CONCUR.



STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

May Term, A.D. 1959

General No. 10240

Agenda No. 8

Beverly Ann Ritter and Beverly Ann  
Ritter as Administratrix of the Estate  
of Jack A. Ritter, deceased,

Plaintiffs-Appellants,

vs.

Central National Life Insurance Company,  
an Insurance Corporation,

Defendant-Appellee.

Appeal from the  
Circuit Court of  
Fulton County

CARROLL, J.

On January 17, 1957, Jack A. Ritter, applied to the soliciting agent of defendant for a life insurance policy for the sum of \$5000. with double indemnity in case of accidental death. The application was in writing, named Beverly Ann Ritter as beneficiary, and in addition to furnishing information concerning the applicant, contained the following clauses:

- "12. I agree that no statements, promises, representations, notice or information made or given by or to the person, soliciting or taking this application, or by or to any other person shall be binding on said Company or in any manner affect its rights unless the same be reduced to writing, made a part of this application and approved in writing by the President, Vice-President or Secretary of said Company.
- "13. It is agreed that the insurance hereby applied for shall not take effect until a policy is issued and delivered by the Company and the first premium paid thereon in full, during the lifetime and good health of the applicant whose life is proposed for insurance.

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THE UNIVERSITY OF CHICAGO  
CHICAGO, ILL. 60637  
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2008-03-28

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"15. I have paid Mr. Harry Little \$8.20 cash; Note for \$ \_\_\_\_\_ due on \_\_\_\_\_ the first monthly premium on the policy applied for on the condition that if the risk is not assumed by the Company, the same is to be returned in accordance with the provisions of Conditional Receipt, which I have accepted subject to the provisions thereof."

On the date of the application, the applicant paid \$8.20 to defendant's agent and received the Conditional Receipt referred to in Clause 15 of the application. On January 31, 1957, defendant sent the applicant the following letter:

"January 31, 1957

Dear Mr. Ritter:

Our underwriting department has advised us that there will be an additional premium of 40¢ per month due to your occupation, making your premium \$8.60 instead of \$8.20. Please let us know if this is acceptable so we may proceed with the issuance of your policy.

/s/ F.H. Rowe  
Secretary

P.S.

We are enclosing a self-addressed envelope for your use."

On February 5, 1957, the applicant wrote the defendant as follows:

"February 5, 1957

Dear Sir:

Received your letter pertaining to the premium of my policy. Yes I accept this and go ahead and issue this policy. Thank you.

/s/ Jack A. Ritter"

On February 10, 1957, Ritter came to his death by accidental means.

On February 14, 1957, defendant sent the following letter to plaintiff, Beverly Ann Ritter:





"February 14, 1957

Mrs. Jack Ritter  
Tablegrove, Illinois

Dear Mrs. Ritter:

Please allow us to express our sympathy of the passing of your husband which we were informed about this date. We are extremely sorry that this policy had not been issued due to the fact that we did not receive a letter from him indicating that he would accept the proposed rate-up until February 11, 1957. Under these circumstances we are enclosing our check in the amount of \$8.20 representing refund of his premium.

Very truly yours,

/s/ F. H. Rowe  
Secretary"

This action is brought by Beverly Ann Ritter, the beneficiary named in the application and as administrator of the Estate of Jack Ritter, deceased. Her complaint as amended alleges in addition to the facts above recited, that defendant refuses to issue a policy; that demand for \$10,000. has been made upon defendant which it refuses to pay; and prays judgment for said amount. Defendant answered the complaint and filed a motion for summary judgment with supporting affidavits and plaintiff filed a counter-affidavit.

The trial court, as indicated by its order, treated defendant's motion as a motion for summary judgment upon the complaint, without consideration of the answer or affidavits of either party and ordered the complaint dismissed for failure to state a cause of action and entered judgment for the defendant.

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Plaintiff argues that the trial court erroneously held the complaint insufficient and insists that defendant's letter of January 31, 1957, constituted a counter-offer to insure the decedent which was not subject to the conditions specified in the application and that the decedent, by mailing his letter of February 5, 1957, accepted said counter-offer to insure decedent or to issue a policy and thereupon an immediate contract of insurance was created between the parties.

If we correctly comprehend plaintiff's theory, it is in effect that defendant accepted the risk described in the application when on January 31, 1957, it wrote decedent concerning the rate-up in premium and then when in his letter of February 5, 1957, decedent agreed to pay the additional premium, there was a meeting of the minds and a contract of life insurance between the parties resulted. In other words, plaintiff is contending that decedent was insured from the time the defendant received the application.

Defendant's answer to such contention is that the agreement made by the parties provided that the insurance applied for should not take effect until a policy was issued and delivered and the first premium thereon paid in full during the lifetime of the applicant, and that the fact allegations of the complaint, if proven, would not establish compliance with such provisions or that the same were waived.

The insured and the defendant had the right to make their own contract for insurance. Where parties are competent to contract they have the legal right to put into their agreement such provisions as they deem fit and the courts are not in such case concerned with



the wisdom or reasonableness of such provisions. Leslie v. Standard Accident Insurance Co., 327 App. 343. The application, which was the insured's offer, expressly provided that the insurance applied for would not take effect until a policy was issued and delivered and the first premium paid thereon in full during the lifetime and good health of the applicant. Thus the agreement of the parties was that the defendant should incur no liability as insurer unless all of the conditions of the application were fulfilled or waived.

In numerous cases it has been held that where an insurance application provides that a policy issued thereon shall not become effective until it is delivered to the applicant during his lifetime and good health, the contract will not become binding until such delivery. Lentin v. Continental Assurance Co., 412 Ill. 158, 105 NE 2d 735; Stramaglia v. Conservative Life Insurance Company, 319 Ill. App. 20, 48 NE 2d 719; Ponel v. Metropolitan Life Insurance Co., 327 Ill. App. 410, 64 NE 2d 225.

In the Stramaglia case, the court considered the effect of a clause in an application for a life insurance policy which provided the policy would not take effect unless the first premium was paid and the "policy delivered to me during my lifetime". The policy was dated April 5, 1940 but not delivered to insured until May 8, 1940. It provided for renewal by payment of an annual premium on or before the 5th day of April of succeeding years with a grace period of one month during which the policy continued in force. The second annual premium was not paid and the insured died

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

WASHINGTON, D. C. 20250

OFFICE OF THE ASSISTANT SECRETARY

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on May 20, 1941. On the appeal, the insurer contended that the insurance coverage of the policy terminated on April 5, 1941, the anniversary date of the policy; that it was subject to renewal only by payment of the second premium on April 5, 1941 or within 30 days thereafter; and that the policy was not in effect on May 20, 1941, the date of insured's death. Deciding adversely to such contention, the court said:

"The law is well established that if all the terms have been agreed upon between the parties, the formal delivery of the policy by the insurer and its acceptance by the insured are not essential to its validity, but if the terms have not been agreed upon, or if the application provides, and it is a condition of the policy itself, that it shall not become effective until it is delivered to the applicant, the contract of insurance will not become binding until such delivery. . .

It is apparent that if the insured died before the policy was delivered to him the insurance would not be in effect and recovery could not be had on the policy."

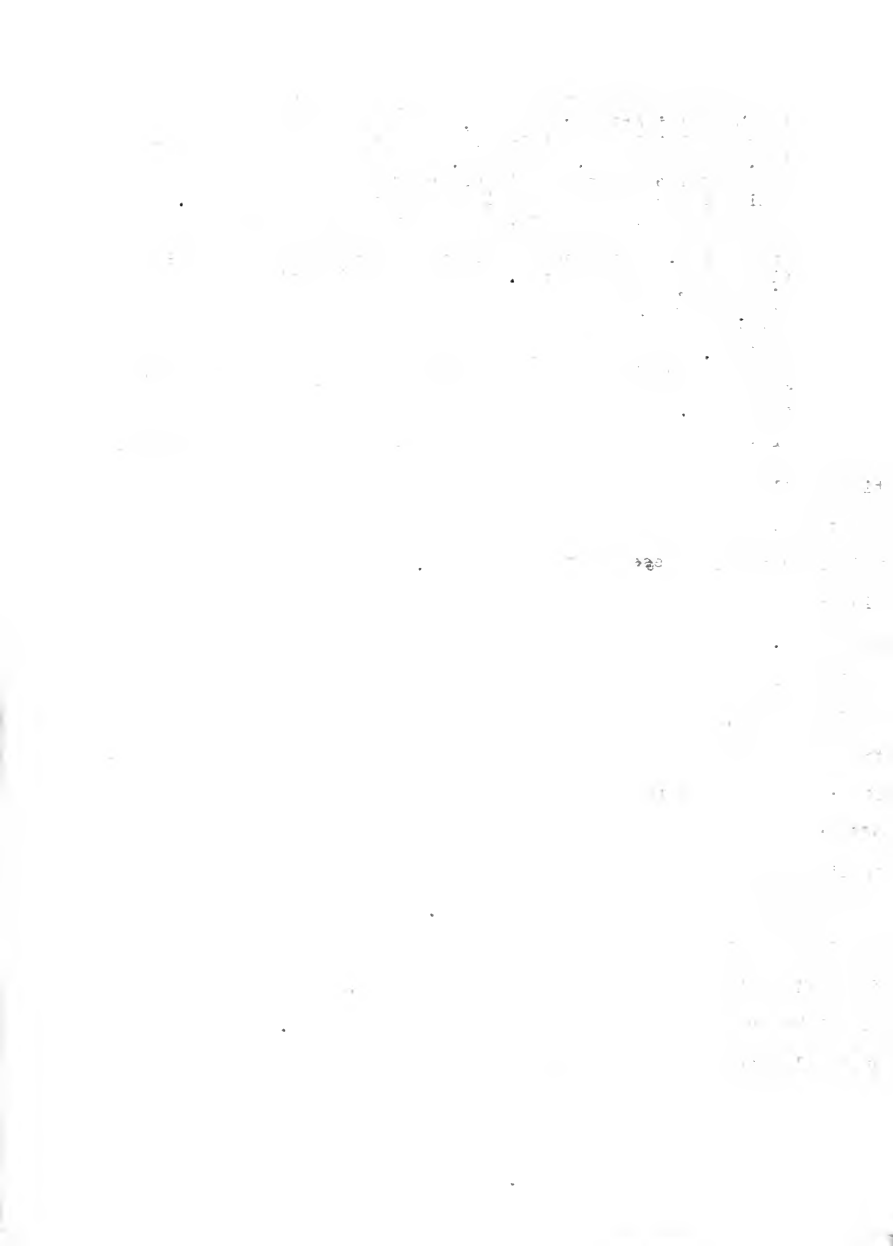
In the Popel case, the application provided that the company should not be liable until the application had been received and approved, a policy issued and delivered and the first premium paid during the lifetime of the applicant. The application was approved by the company on July 26, 1940 and a policy was mailed to its Chicago office where it was received July 31, 1940. The insured died July 26, 1940. Upon learning of his death, the Chicago district manager withheld delivery of the policy and returned it to the home office in New York. The Appellate Court in reversing judgment for the beneficiaries named in the policy, had this to say:





"Fulfillment of less than all the conditions named in the application would not, in the absence of waiver of the fulfilled conditions, render the contract effective. The evidence, therefore, of the various steps taken by the defendant did not of themselves render the policy effective for they logically preceded delivery. We cannot say, therefore, that because these conditions alone were met that the contract was treated as in force and effect. The steps the company took were those provided in the application. It had no obligation to determine before or while taking them, that the insured had died. It had saved to itself in the application the privilege of determining this when it was prepared to deliver. To hold that, by performing the previous steps, defendant relinquished the protection it saved to itself, would seem to us would frustrate the meaning of its agreement."

It is made clear by these decisions that where the application spells out the conditions upon which the insurance becomes effective, performance of such conditions, in the absence of a waiver thereof, is essential to recovery. In the instant case it is conceded that the delivery condition of the application was not performed. Plaintiff seeks to avoid the consequences of such failure of delivery of the policy by arguing that defendant by its letter of January 31, 1957, made what constituted a counter-offer to insure the decedent without regard to any of the conditions of the application; that decedent's letter was his acceptance of such counter-offer; and that as the result of this exchange of letters a contract of life insurance was created and any condition precedent in the application was waived by the defendant. The occasion for writing the letter of January 31, as is plainly shown by its contents, was the fact that due to the decedent's occupation, his premium rate was higher than the amount stated in the application. The purpose of the letter was to ascertain whether defendant should proceed



to issue the policy applied for at the higher rate. It recognized and referred directly to the application and in no way did it propose any change in the terms or conditions upon which the policy was to be issued. It clearly negatives any suggestion that defendant thereby offered to insure the decedent upon any terms other than those contained in the application. It follows that the mailing of decedent's letter did not, as contended by plaintiff, create a contract of insurance effective as of February 5, 1957.

For the reasons indicated, the judgment of the trial court is affirmed.

Affirmed.

REYNOLDS, P. J. concurs.

ROETH, J. took no part in the consideration of this case.

ROBERT J. took no part in the consideration of this case.  
REYNOLDS, P. J. concurred.

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10226

Agenda No. 4

Gerald B. Heiden, Administrator of the  
Estate of John A. Heiden, deceased,

Plaintiff-Appellant,

vs.

Arvis Gaddberry et al.,

Defendants.

# # #

Ray Lynch, d/b/a Lynch Tavern,

Defendant-Appellee.

Appeal from the  
Circuit Court of  
Macon County

ROETH, Justice.

On May 2, 1956, plaintiff's intestate received injuries from which he subsequently died, as a result of a collision between an automobile and a wagon loaded with corn which plaintiff's intestate was pulling behind a tractor. Subsequently plaintiff brought suit against one Arvis Gaddberry under the Wrongful Death Act. The complaint filed alleged in substance that Arvis Gaddberry was operating an automobile on the day in question and that he negligently drove said automobile into the rear of the wagon which the deceased was pulling by tractor.

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The defendant Gaddberry filed an answer in which he denied operation of the automobile and denied any negligence.

Subsequently in 1957 by two separate orders, plaintiff obtained leave to add Ray Lynch d/b/a Lynch Tavern as a party defendant and Richard Lusman and Harry Houchins as party defendants. Two additional counts were filed to the complaint, one against defendant Ray Lynch under the Dram Shop Act and the other against Richard Lusman and Harry Houchins, also under the Dram Shop Act. The count against Ray Lynch alleged in substance, that Arvis Gaddberry consumed liquor furnished by Ray Lynch; that as a result thereof in whole or in part he became intoxicated; that while so intoxicated he operated and drove his automobile into the wagon being pulled by the deceased as a result of which deceased was injured and subsequently died. The additional count against Richard Lusman and Harry Houchins was the same as that filed against Ray Lynch. Ray Lynch filed an answer denying operation of the car by Gaddberry and denying any intoxication on the part of Gaddberry. For all practical purposes the separate answer of Richard Lusman and Harry Houchins was the same as that filed by Ray Lynch. Thus, at the outset, plaintiff was informed by three separate answers that operation of the automobile by Arvis Gaddberry was being denied.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

2. The second part of the report is a detailed description of the study area. It includes information about the location of the study area, the population of the study area, and the characteristics of the study area. It also discusses the data sources used in the study.

3. The third part of the report is a description of the methodology used in the study. It includes information about the research design, the data collection methods, and the data analysis methods. It also discusses the limitations of the study.

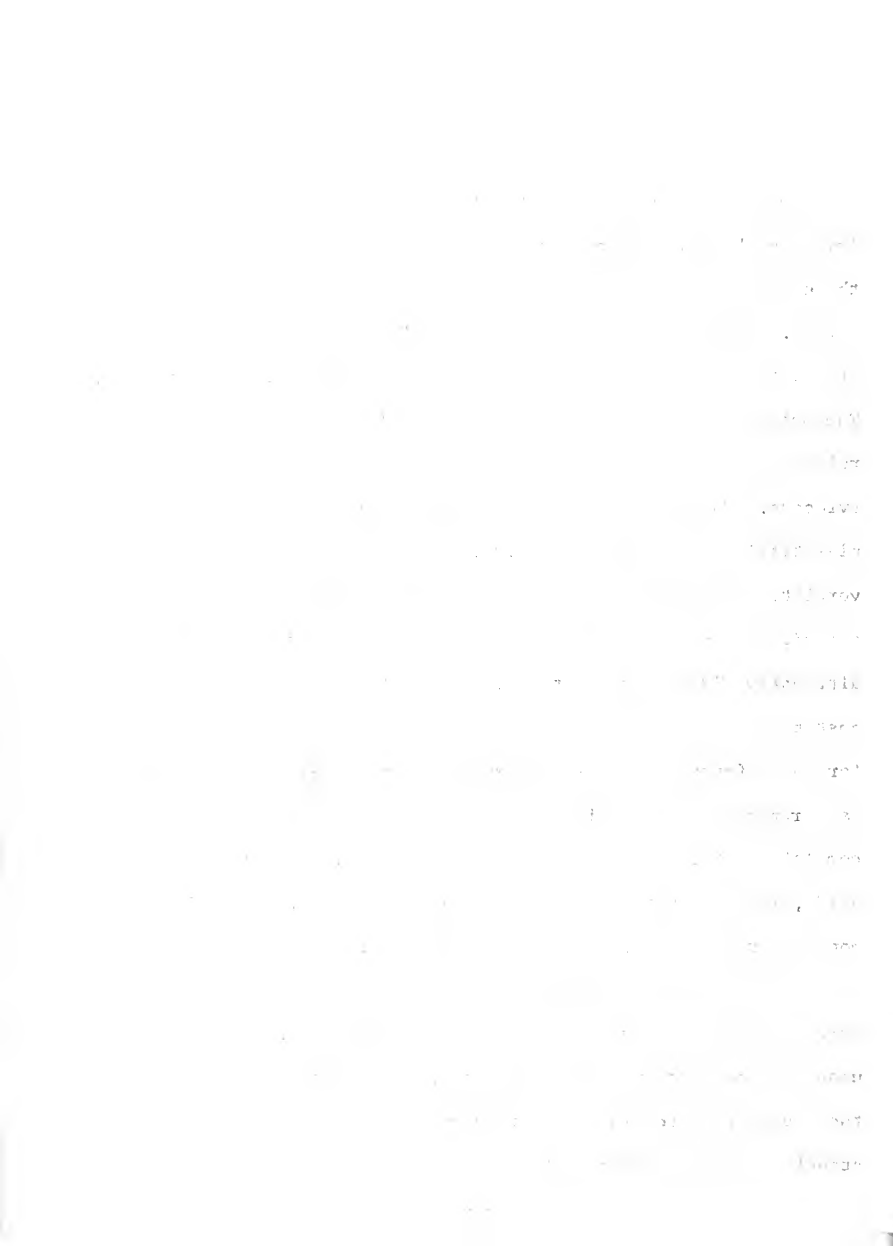
4. The fourth part of the report is a description of the results of the study. It includes information about the findings of the study, the conclusions drawn from the findings, and the implications of the findings. It also discusses the strengths and weaknesses of the study.

5. The fifth part of the report is a conclusion. It summarizes the findings of the study and provides a final statement about the study. It also discusses the future research that is needed in this area.



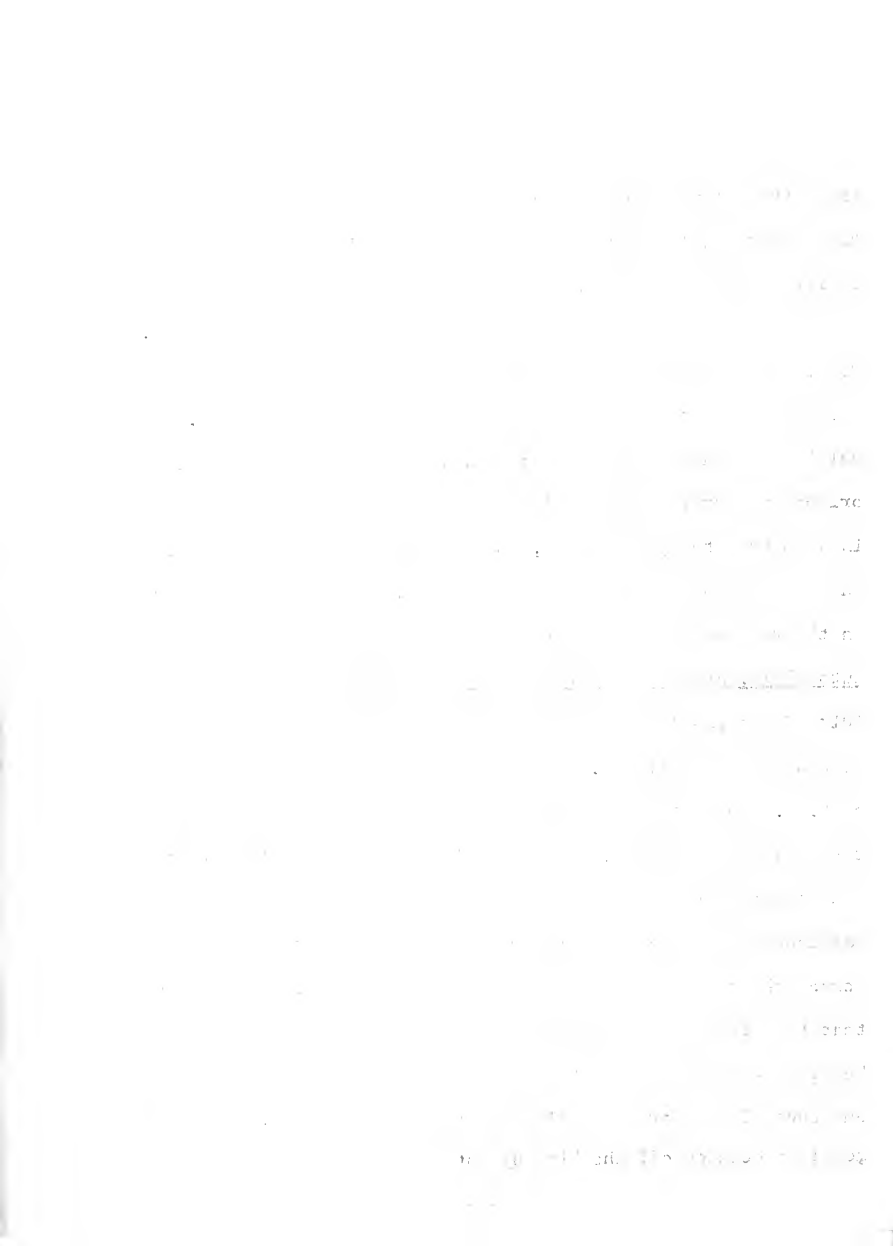
On May 15, 1958, plaintiff dismissed the suit as to defendants Arvis Gaddberry, Richard Lusman and Harry Houchins and on May 27 the case proceeded to trial as against Ray Lynch d/b/a Lynch Tavern. Both at the close of plaintiff's case and at the close of all the evidence defendant made a motion for a directed verdict. The motion made at the close of plaintiff's case was denied and ruling was reserved on the motion made at the close of all the evidence. The jury found the defendant guilty and assessed plaintiff's damages at \$12,500.00. Judgment was entered on the verdict. Defendant then filed a post trial motion (1) to set aside the verdict and enter judgment for defendant and in the alternative (2) for a new trial. One of the grounds for the post trial motion to set aside the verdict and enter judgment for the defendant was, "There is no evidence that Arvis Gaddberry was driving the automobile in question at the time of the accident complained of". The court granted the motion, set the verdict aside, entered judgment for defendant and denied defendant's motion for new trial. This appeal followed.

Defendant again contends in this court that there is no evidence that Gaddberry was driving the automobile. In passing upon this contention we are fully cognizant that we must examine the record to determine whether there is any competent evidence, standing alone, together with any reasonable inferences to be



drawn therefrom, taken with its intendments most favorable to the plaintiff, to support the allegation that Gaddberry was operating the automobile.

The collision occurred on U. S. Route 54, a paved highway. U. S. Route 54 extends in a northeast-southwest direction between Mt. Pulaski on the Southwest and Chestnut on the northeast. The collision occurred at about 4:00 P.M. and the day was clear, bright and warm. Plaintiff's intestate was operating a tractor in a northeasterly direction, in the right hand lane of U. S. 54 and was pulling a wagon loaded with corn. The wagon was struck in the rear by a Lincoln automobile. Two people were in this automobile, Arvis Gaddberry and Fern Scroggins. The witness Edith Tolan was looking out of a bedroom window in her home and witnessed the collision. Her home was located on the east side of U. S. Route 54 and about 1½ to 2 blocks northeast of where the collision occurred. She testified that she saw the tractor and wagon; that she saw the automobile come upon it; that she was conscious of an impending collision and that the automobile struck the rear of the wagon squarely from behind. She testified that the driver of the tractor was not thrown from it but that he drove the tractor off the highway onto the right hand shoulder and then slid or crawled off the seat of the tractor. The automobile proceeded off the highway onto the left hand shoulder and



stopped across the highway from the tractor. She saw a man and woman get out of the automobile and run across the highway to where plaintiff's intestate was lying on the ground. No questions were asked of the witness Tolan as to whether she knew or could see who was driving the automobile or whether she knew or could see from which side or door the man and woman respectively came from the automobile.

The witness Louis Barrick came upon the scene of the collision while proceeding northeast toward Chestnut. He saw Arvis Gaddberry lying on the ground on the left side of the pavement with blood on his face. Fern Scroggins was holding his head.

The witness Mary Ship came upon the scene of the collision as she was proceeding southwest toward Mt. Pulaski. She stopped and saw plaintiff's intestate lying on the shoulder behind the tractor and Mr. Gaddberry lying on the shoulder across the highway from plaintiff's intestate and in front of the automobile. First aid was being given to plaintiff's intestate. She went over to Gaddberry, whom she knew, and noticed that he had cuts about the forehead and face and was bleeding. Fern Scroggins was kneeling or stooping down beside him and Louis Barrick was placing a towel to his face and forehead. At the request of plaintiff's intestate the witness Ship questioned Gaddberry

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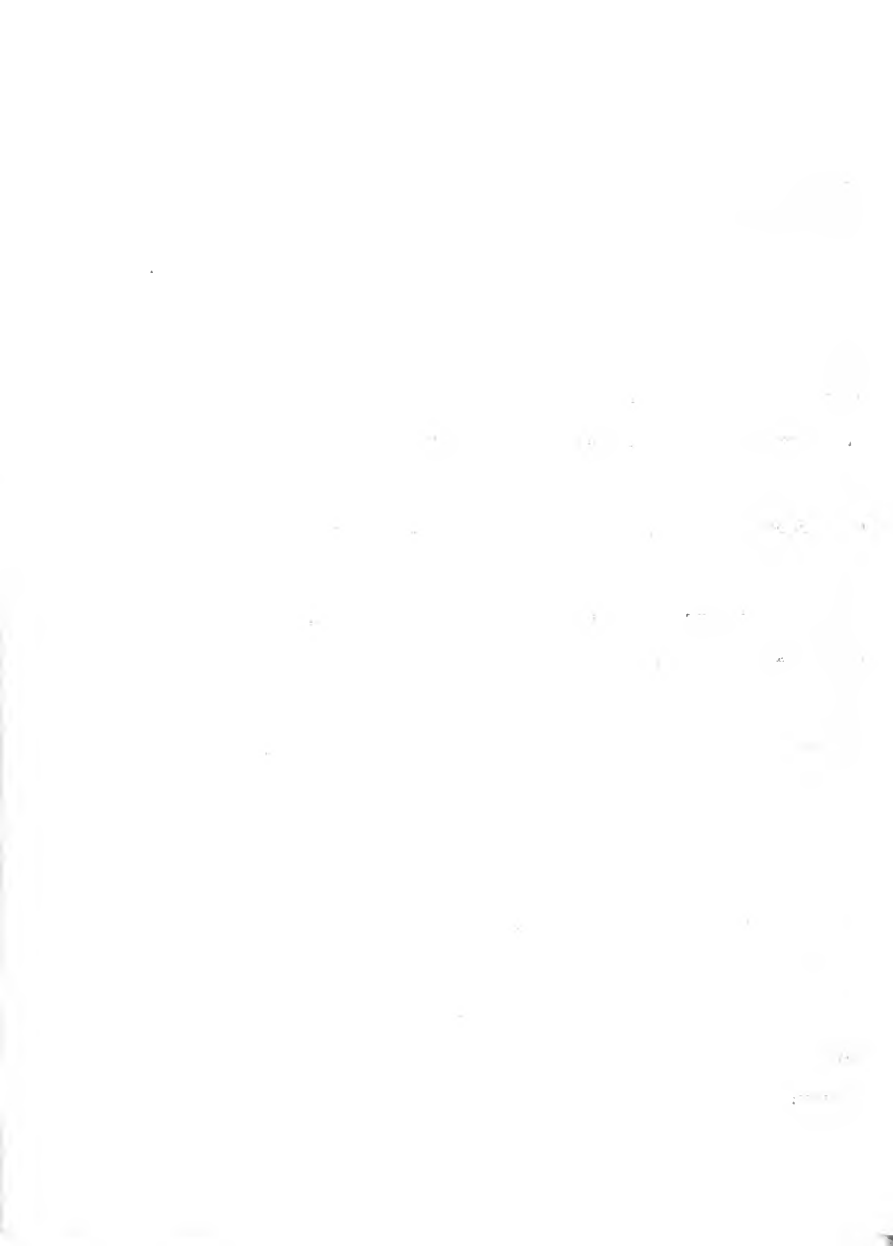
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as to his name and driver's license and he furnished that information.

Robert Werner, a State Trooper, investigated the accident. When he arrived, the parties involved were not present. The tractor and automobile were still in their respective places on the two shoulders. The wagon had been demolished, corn was all over the highway, and there were considerable skid marks but it was impossible to determine whether they were made by the tractor and wagon or the automobile. He examined the automobile and found that the front grill was damaged and that the right upper corner of the windshield was cracked. Werner testified that he talked with Arvis Gaddberry and Fern Scroggins about 2 hours after the accident at the hospital. Gaddberry was in bed and Fern Scroggins was in a chair in the room. So far as the record in this case shows Fern Scroggins was not injured in the collision. During the course of direct examination the witness Werner was asked the question as to whether he found out who was driving the automobile. To this question an objection was made on the ground that no sufficient foundation had been laid at that point for the question. The objection was sustained. The following then occurred in the examination of the witness Werner:





"Q Did you ever in your investigation confront the people who had been in the Lincoln automobile?

A Yes, sir.

Q Where was that?

A It was at the Abraham Lincoln Memorial Hospital, Lincoln.

Q Did you ask them who was driving?

A Yes, sir.

Q Who did you ask? The Man or woman?

MR. HENSS: I object to this on the grounds it is hearsay.

MR. WIENMAN: I will withdraw the question.

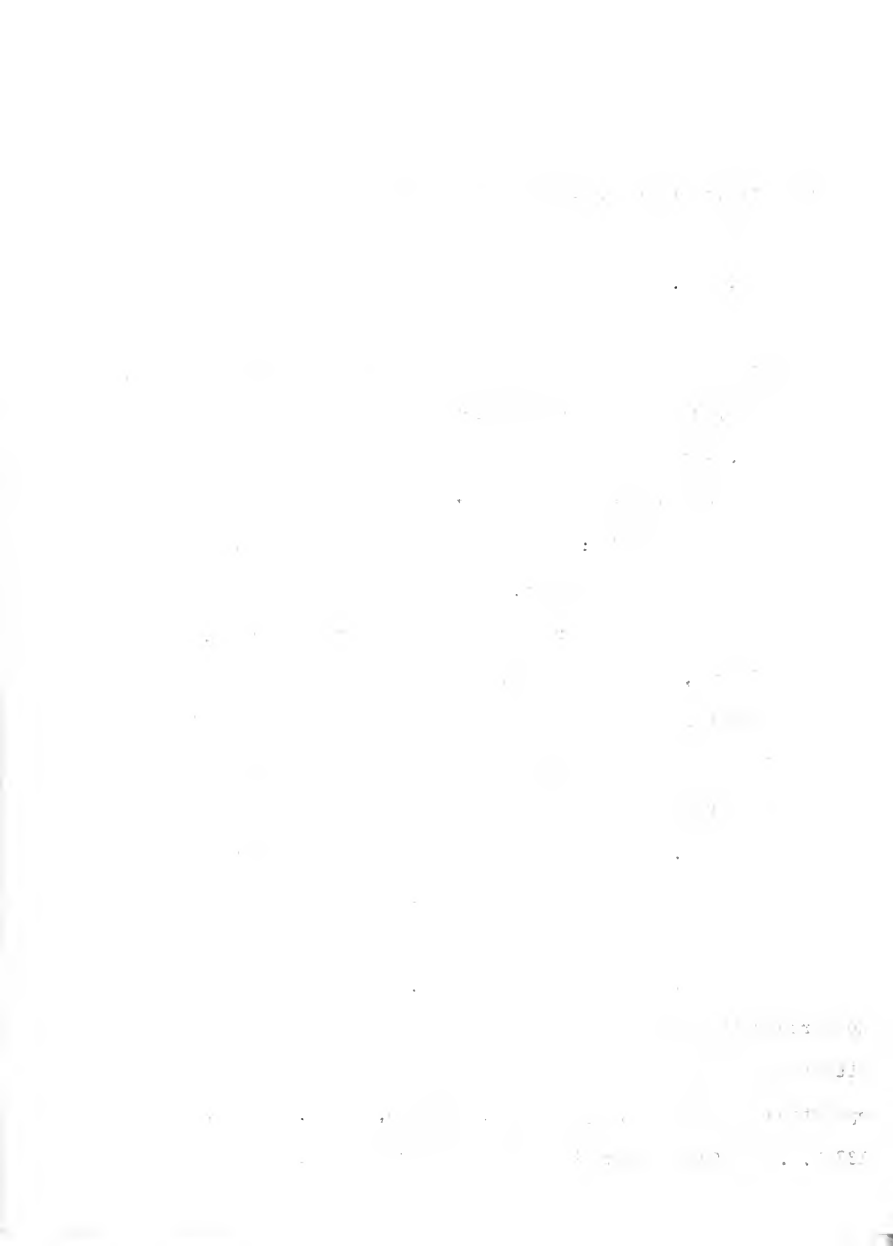
Q Officer, I will ask you, if you ever saw any papers relating to the ownership of that Lincoln automobile involved in this accident? Did you pursue the investigation that far?

MR. HENSS: I will object. Ownership has nothing to do with that at all.

THE COURT: Sustained.

MR. WIENMAN: You may ask."

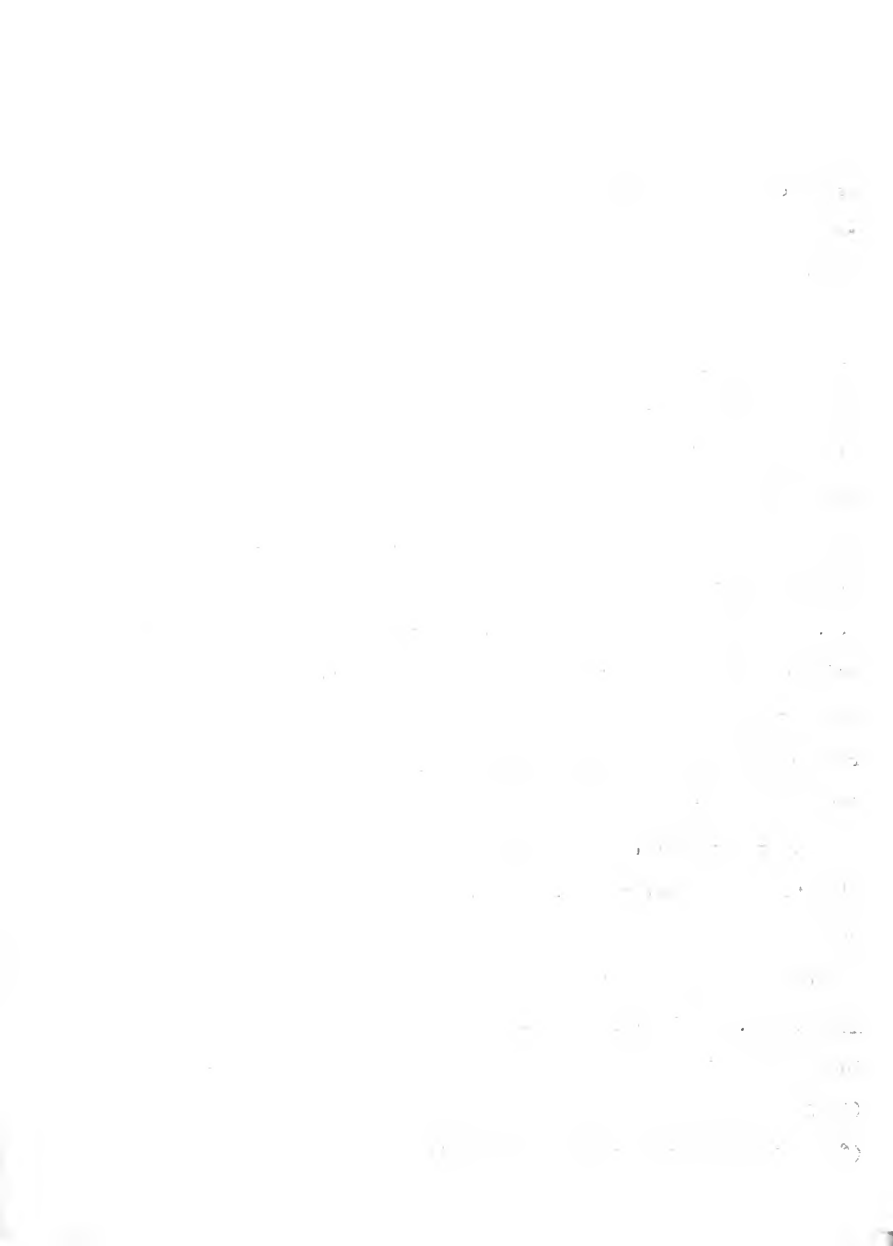
No further attempt was made by counsel for the plaintiff to prove either ownership of the automobile (from which a presumption of operation would arise, Robinson v. Workman, 9 Ill. 2d 420, 137 N.E. 2d 804) or actual operation by Gaddberry. No proof



was made as to the license number on the Lincoln automobile and to whom the license plates had been issued or that Arvis Gaddberry had been issued license plates for the automobile in question.

Not relying entirely on the abstract, we have carefully examined the record itself and believe that the foregoing resume' of facts accurately sets out all the facts which might be directly or remotely said to bear upon the question of operation of the automobile. Certainly there is no direct evidence that Gaddberry was operating the automobile in question. What circumstantial evidence there is in this record negatives operation by Gaddberry, i.e., a square head on collision, Gaddberry was cut on the forehead and face, the upper right hand side of the windshield was cracked and Fern Scroggins was not injured. Nor are we able to draw any reasonable inferences from the testimony that would establish that Gaddberry was the driver of the automobile.

To counteract this deficiency in the evidence, counsel for plaintiff make several contentions. First it is contended that by offering defendant's instruction #13 which was given, defendant admitted operation of the car and cites Robeson v. Grayhound Lines, Inc., 257 Ill. App. 278. Instruction #13 is the usual instruction that before plaintiff can recover she must prove (1) Gaddberry was sold or given intoxicating liquor by defendant (2) that such liquor caused or contributed to cause the intoxica-



tion of Gaddberry (3) that Gaddberry and not plaintiff's intestate caused the collision in question (4) that plaintiff's intestate died as a result of the collision in question (5) that his wife lost her means of support. Plaintiff's contention is that by using the phraseology "that Arvis Gaddberry and not John A. Heiden caused the collision in question" it must be assumed that Gaddberry was operating the automobile. The cited case does not sustain this theory. In that case defendant filed a special plea denying ownership and operation by its servant of a bus. An instruction offered by defendant was given, to the effect that if the jury believed that plaintiff's auto was being operated in a careful manner "and that defendant's driver did everything" that a reasonable person would have done to avoid collision, etc. The Appellate Court, independent of this instruction, held that a prima facie case of ownership and operation had been established and then added by way of dictum that the instruction above assumed and told the jury that the bus was the property of defendant and the driver was defendant's servant. No such construction can be placed on Instruction #13 given in this case.

Plaintiff also contends that the fact that witness Ship inquired of Gaddberry as to his drivers license is evidence that Gaddberry was the driver of the automobile. We do not believe that this is a reasonable inference to be drawn from this evidence.



It may have been assumed by plaintiff's intestate that Gaddberry was the driver since a man and woman were in the car. Another person taking into consideration the nature of the collision and nothing more, might just as readily have assumed that the woman was the driver of the automobile. This testimony established that Gaddberry had a drivers license. Proof of this fact would lead to an inference that it was possible that Gaddberry was driving the car. But proof of a mere possibility is not sufficient. A theory cannot be said to be established by circumstantial evidence, unless the facts are of such a nature and so related, as to make it the only conclusion that could reasonably be drawn. It can not be said one fact can be inferred, when the existence of another inconsistent fact can be drawn with equal certainty. Celner vs. Prather, 301 Ill. App. 224, 22 N.E. 2d 397; Stuehrk vs. Bartlett, 15 Ill. App. 2d 569, 147 N.E. 2d 200.

Plaintiff also contends that defendant did not contradict that Gaddberry was the driver and did not produce Gaddberry or Fern Scroggins as witnesses. Counsel cites 58 Am. Jur. page 26, section 8, in support of this point. As to the first contention in this regard, there is no merit to the contention. Defendant's answer denied operation of the automobile. Proof of the operation of the automobile was therefore one of the essential elements of plaintiff's case. The burden was upon the plaintiff

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2. The second part is a detailed account of the work done during the year.

3. The third part is a summary of the work done during the year.

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17. The seventeenth part is a summary of the work done during the year.

18. The eighteenth part is a summary of the work done during the year.

19. The nineteenth part is a summary of the work done during the year.

20. The twentieth part is a summary of the work done during the year.

21. The twenty-first part is a summary of the work done during the year.

22. The twenty-second part is a summary of the work done during the year.



to prove this element and not on the defendant to contradict it in the absence of a prima facie showing. The cited authority announces the well established rule that failure to produce an available witness who could testify upon a material issue, if not explained, gives rise to an inference that the testimony of such witness, if presented, would be adverse to the party who failed to call him. Plaintiff can derive no comfort from this rule. As far as this record shows, Gaddberry and Fern Scroggins were available as witnesses to plaintiff. Gaddberry was still a party defendant at the time the case was set for trial. Absent a prima facie showing on operation, their testimony on this issue was material to the plaintiff and not to the defendant.

It is further contended by counsel for plaintiff that by objecting to the questions hereinbefore set out, counsel for defendant conceded that ownership of the automobile had been proved. Cited in support of this contention are Fregne v. Five Cent Cab, 381 Ill. 594, 46 N.E. 2d 386, Spies v. Sussman, 264 Ill. App. 528, Whipkey v. Ashbaugh, 267 Ill. App. 452, and Pagano v. Leisner, 5 Ill. App. 2d 223, 125 N.E. 2d 301. We have examined these cases and they do not support the contention of counsel for plaintiff.

Finally it is contended that the trial court did not assign

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as a reason for setting aside the verdict and entering judgment for defendant, the absence of proof of the operation of the automobile. The record shows that the reasons assigned were "the record is devoid of any evidence of consumption of intoxicating liquor by the defendant, Arvis Gaddberry, and that the record is devoid of proof of actual intoxication and other necessary facts to support the judgment." Emphasis supplied. There is no merit in this contention.

We are of the opinion that plaintiffs wholly failed to prove that Arvis Gaddberry was operating the automobile involved in the collision. Other points urged in support of the action of the trial court in setting aside the jury's verdict and entering judgment for defendant need not be considered. It is likewise not necessary for us to pass upon defendant's alternative points in support of his alternative motion for new trial.

Accordingly the judgment of the Circuit Court of Mason County will be affirmed.

Affirmed.

REYNOLDS, P.J. and CARROLL, J., concur.



47683

NATHANIEL RIDDLE,	)	
	)	
Appellee,	)	APPEAL FROM CITY COURT,
	)	
v.	)	CHICAGO HEIGHTS,
	)	
CARRIE RIDDLE,	)	ILLINOIS.
	)	
Appellant.	)	

28-2250-2

MR. PRESIDING JUSTICE DEMPSEY DELIVERED  
THE OPINION OF THE COURT.

Nathaniel Riddle filed a suit for divorce against Carrie Riddle. At the same time, he also filed the defendant's appearance, her waiver of the service of summons and her consent to a default decree. The complaint alleged extreme and repeated cruelty. Testimony was heard, and on September 13, 1958, a decree was entered which granted the defendant, in lieu of alimony, a tavern known as Riddle's Lounge.

On October 8, 1958, the defendant filed a petition, alleging in part that the plaintiff sold the tavern prior to the entry of the decree and praying that the portion of the decree barring her from alimony be vacated. The plaintiff's answer denied this allegation.

On November 6, 1958, the defendant asked leave to file an amendment to her petition of October 8th. The proposed amendment charged that her appearance, waiver of service of summons and consent to a default were obtained by fraud; that she signed such papers upon the representation of her husband that they concerned the tavern, and that the averments in the complaint and the testimony of the plaintiff



and his witnesses were untrue. She prayed for the vacation of the divorce decree and for other relief and asked for a hearing on her amended petition and any answer filed thereto. The court denied leave to file this amendment, and the defendant appeals from that order. The primary question is whether there can be an appeal.

Although the pleading of November 6th is designated as an amendment to the petition of October 8th, it is now contended that it is a petition under sec. 72 of the Civil Practice Act (sec. 72, ch. 110, Ill. Rev. Stat. 1957). If it is, the order denying leave to file it is appealable under subsec. (6) of sec. 72. If it is not, it is neither appealable as a final order under sec. 77 of the Civil Practice Act nor as an interlocutory order under sec. 78 of that act. Koontz v. Public Service Co. of Northern Ill., 325 Ill. App. 260.

Nothing in the heading or the body of the proposed pleading mentions sec. 72; nothing in the record before us shows that the trial judge was apprised of the contention that the pleading was presented under that section. Nevertheless, since it is claimed to be such a petition, we must look into its substance. In reality the so-called amendment did not, in any way, amend the original petition; it was a complete substitute for it. An amendment which is complete in itself and does not refer to or adopt the prior pleading supersedes it and the prior pleading is abandoned. 30 I.L.P. sec. 113; Wright v. Risser, 290 Ill. App. 576





The amendment alleged matters of fact not appearing in the record which would have precluded the entry of the decree and, in effect, challenged the jurisdiction of the court because of the plaintiff's fraud in not giving the defendant notice of the pendency of the suit. Both of these averments constitute grounds for relief within the purview of sec. 72. One of the functions of that section, as a replacement for bills of review, writs of error coram nobis, etc., is to bring before the court matters of fact not appearing in the record which, if they had been known to the court at the time the decree was entered would have prevented its entry. Ephraim v. The People, 13 Ill.2d 456; Michel v. Edgewater Hospital, 18 Ill. App.2d 160. The amendment was verified by the defendant, and thus subsec. (2) of sec. 72, which requires an affidavit as to matters not of record, was complied with. The writ of error coram nobis was also employed to assert the availability of a valid defense which, without negligence on the part of the defendant, was not made because of fraud. Glenn v. The People, 9 Ill.2d 335. Here the defendant swore that the charges in the complaint were untrue, and the testimony of the plaintiff and the witnesses was false. This was a valid defense which, according to her motion, she was prevented from making because of the plaintiff's fraud.

Because of these considerations we find that the proposed pleading was one which came within sec. 72, and, therefore, the order denying leave to file it is appealable. Since we have



reached these conclusions we must also conclude that the court should have permitted it to be filed. The case will be remanded for this purpose. The ends of justice require a full hearing on the serious charges contained in the defendant's pleading.

Reversed and remanded with  
directions.

Schwartz and McCormick, JJ., concur.

Abstract only.



47730

JEFF BRYANT and JEFF BRYANT, JR.,	)	
	)	
Appellants,	)	
	)	APPEAL FROM MUNICIPAL
v.	)	
	)	COURT OF CHICAGO.
METROPOLITAN MOTORISTS ASSOCIATION	)	
and HENRY W. HAMMOND,	)	
	)	
Appellees.	)	

MR. JUSTICE McCORMICK DELIVERED THE  
OPINION OF THE COURT.

This appeal is taken from an order of the trial court  
vacating a summary judgment.

On November 6, 1958 the trial court, on motion of  
Jeff Bryant and Jeff Bryant, Jr. (hereafter referred to as  
plaintiffs), supported by affidavits, entered a summary judg-  
ment in favor of the plaintiffs and against Metropolitan  
Motorists Association and Henry W. Hammond (hereafter  
referred to as defendants), in the sum of \$924.26. On  
December 17, 1958, some 41 days later, defendants filed a  
motion under section 72 of the Practice Act (Ill. Rev.  
Stat. 1957, chap. 110, par. 72) to vacate the said  
summary judgment. On December 22, 1958 the trial court  
entered an order vacating the summary judgment, from which  
order this appeal is taken.

This case grew out of an automobile accident, when  
Jeff Bryant, Jr., who was operating an automobile owned by  
Jeff Bryant, Sr., was involved in a collision with another  
car. Prior to this accident the Bryants had given the  
Metropolitan Motorists Association \$77, as they believed,



to either issue or secure a policy of insurance protecting them against liability. As a result of the accident the Bryants were sued. The Bryants referred the matter to the Metropolitan Motorists Association, which retained the defendant Henry W. Hammond, an attorney, to defend the suit. Hammond entered his appearance for the Bryants. On March 6, 1957 Hammond did not appear in court and a default judgment was entered against the Bryants. As soon as the Bryants learned that judgment had been entered against them they informed Hammond, but he took no steps to vacate the judgment. The Bryants subsequently paid the judgment and filed the instant suit against the Metropolitan Motorists Association and Henry W. Hammond.

In this suit the plaintiffs in their statement of claim set out the collision, the resulting suit, the default judgment against them and their payment of the same, and they also allege that they were covered by a policy of insurance issued by the defendant Metropolitan Motorists Association and that by the terms of such policy the said Association was required to defend the suit and should pay any judgment entered against the plaintiffs. They further allege "that the defendant, Metropolitan Motorists Association, retained Henry W. Hammond to defend the said suit, and said defendant, Henry W. Hammond, entered his appearance in said suit as attorney for Jeff Bryant and Jeff Bryant, Jr." and that the judgments were entered as a result of the failure and neglect





of the defendants to defend the suit.

Separate answers were filed by the Metropolitan Motorists Association and Hammond. Both answers set out that Hammond informed the court that Jeff Bryant, Jr. was in military service, that the case was then placed upon the military calendar, and that Hammond received no notice that the case would be removed from the military calendar. The answers differed in that Hammond admits that a policy of liability insurance was issued by the Metropolitan Motorists Association to the Bryants. This is denied in the answer of the Association. Both answers admit that Hammond was retained by the Association to defend the suit, and deny that he was negligent in such defense.

None of the pleadings were under oath. The defendant Metropolitan Motorists Association answered, under oath, certain interrogatories, stating that it had received \$77 from the plaintiffs for a policy of insurance; that it was unable to get insurance; that it had retained attorney Hammond to defend the suit brought against the Bryants and had paid him a retainer; that Hammond had appeared in court on the case; that the Association found out about the judgment a year after it was entered; and that it did not pay the amount of the judgment.

In their motion for summary judgment the Bryants stated that a notice had been served upon Hammond in the original case notifying him that a motion would be made by the plaintiffs



-4-

therein to remove the case from the military calendar and set it for hearing, and that the court in accordance with the motion so ordered. In an affidavit of Jeff Bryant, Jr. attached to the motion for summary judgment he stated that when he was discharged from the army he had notified Hammond of his discharge. Bryant, Sr., in his affidavit attached to the motion, stated that he had appeared in court with Hammond on the original case many times, and that Hammond was advised of Bryant, Jr.'s discharge from the army.

The defendants in their motion brought under section 72 of the Practice Act to vacate the summary judgment raised only one tenable point. They allege that "the entry of a Summary Judgment where the pleadings raise genuine issues of material fact, is beyond the power of the Court, and contrary to law; the pleadings in this cause raised genuine issues of material fact. Therefore, plaintiffs' motion for Summary Judgment should have been denied. The judgment entered herein is void."

The question squarely presented to this court is, Did the trial court properly enter a summary judgment.

"The purpose of statutory provisions for summary judgment is to facilitate litigation and expedite trial procedure and to provide a means to avoid the expense and delay of a trial when no sound defense exists. They are remedial in nature and should be liberally construed in order that the injustice of delaying litigants in the collection of their claims may be obviated." 23 I.L.P. Judgments sec. 71. In Gliwa v. Washington



Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, at 470, the court says:

"The purpose of the procedure is not to try an issue of fact as that term is used in law but rather to try whether there is an issue of fact between the parties within the legal meaning. The method is necessarily inquisitorial. The pleadings (important) are not controlling. If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded."

The plaintiffs' motion for summary judgment, considering the pleadings, the affidavits, the interrogatories and the sworn answers thereto, and the files of the court, raises an issue as to the negligence of the defendant Hammond, who admittedly was retained by the defendant Metropolitan Motorists Association to defend the Bryants in the suit brought against them. Both Hammond and the Association plead in their unsworn answers that Hammond was not negligent since he had no notice from the Bryants that Bryant, Jr. had been discharged from the military service or that the case had been removed from the military calendar. Both the Bryants in their affidavits state that Hammond had been so notified and in the motion for summary judgment they state that plaintiffs served notice upon Hammond in the suit in which he was representing the Bryants, notifying him that on the 7th day of December, 1956 they would move the court to remove the cause from the military calendar and set it for trial at an early date and that on that date a judge of the Municipal Court entered such an order. The files in that case were available to the trial court and undoubtedly were before him at the time. It is nowhere denied by the defendants here



that such order appeared of record in the files of the original case. No counteraffidavits were filed by the defendants, and on the issue as to the negligence of defendant Hammond there was no triable issue of fact.

It is elementary law that an attorney is required to exercise diligence and a reasonable degree of care and skill, and if he is derelict in so doing he may become liable for a loss so occasioned. 4 I.L.P. Attorneys and Counselors, sec. 67. In Olson v. North, 276 Ill. App. 457, at 473, the court, quoting from the opinion rendered in Olson v. North, 266 Ill. App. 621, says:

"When a person adopts the profession of law, if he assumes to exercise the duties in behalf of another for hire and reward, he must be held to employ in his undertaking a reasonable degree of care and skill. If injury result to the client from the want of such a degree of reasonable care and skill, he must respond in damages to the extent of the injuries sustained. It is the duty of an attorney to bring to the conduct of his client's business the ordinary legal knowledge and skill common to members of the legal profession, to act toward his client with the most scrupulous good faith and fidelity, and to exercise in the course of his employment that reasonable care and diligence which is usually exercised by lawyers."

The summary judgment was properly entered against defendant Hammond.

A summary judgment could properly be entered against the defendant Metropolitan Motorists Association on either of two grounds. The Association admittedly made a contract with Hammond to defend the Bryants in the suit brought against them. Hammond entered his appearance in the case and negligently failed to defend the suit. The Bryants by the payment of \$77 to the Association had become members of the Association and the





Association was thereby obligated to retain an attorney to defend them, and because of that obligation Hammond was hired by the Association to protect the interests of the Bryants. Such agreement is spelled out in the sworn answers to the interrogatories. In those answers the Association states that it had received \$77 from the Bryants, that the money was received for a policy of automobile insurance which was not issued, and for membership in the Association, that Bryant became a member of such Association and that because of such membership the Association retained Hammond to defend the suit brought against the Bryants. Question No. 13 is: " \* \* \* was Henry W. Hammond retained because of an obligation arising out of an insurance policy obligating the Metropolitan Motorists Association to defend Jeff Bryant and Jeff Bryant, Jr." Answer 13: "No policy issued. Bryant was a motor club member and the company supplied attorney Hammond." Question 20: "State any action or actions which the Metropolitan Motorists Association, its officers, agents, employees or servants took to safeguard the rights of the plaintiffs Jeff Bryant and Jeff Bryant, Jr. after a default judgment was entered." Answer 20: "The company hired Hammond to protect Bryant." The Association is responsible for the consequent loss resulting from Hammond's admitted negligence. On this ground summary judgment could have been properly entered against the Association.

It is admitted that the Association received money from the Bryants for the purpose of securing for them a policy of



liability insurance, that the policy was not secured, nor were the Bryants notified of that fact. Under the law, if an agent or broker is employed to secure a policy of insurance for another, his failure to procure such insurance renders him liable for the resulting loss. 22 I.L.P. Insurance, sec. 77; Johnson v. Otta, 340 Ill. App. 270. Under this rule of law summary judgment could also have been properly entered against the Association.

The judgment was proper under the record before the trial court at the time of the entry of the judgment. There was no triable issue of material fact before the court, and the defendants have failed to substantiate the contention raised in their motion under section 72. The fact that in the pleadings of the Association it denied that there was a policy of insurance issued is, in the view which we take of the case, not controlling.

It is unnecessary to discuss the further contentions raised by the defendants. The order of the Municipal Court of Chicago vacating the summary judgment is reversed.

Reversed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.



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47662

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel JOSEPH F. BOWDISH,

Plaintiff - Appellant,

v.

CARL RELI,

Defendant - Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a quo warranto action to oust defendant as chief of police of the Village of Markham. The relief was denied after a hearing on the complaint and answer. Plaintiff appeals.

At a regular meeting of the Village Board in December, 1957, plaintiff was appointed chief of police and defendant was ordered to relinquish that office. Four trustees voted in favor of this appointment; the Village president and the two remaining trustees voted against it. The defendant refuses to surrender the office.

Defendant contends that since Markham has a population in excess of 5,000 the appointment of the chief of police must be in accord with the provisions of the Cities and Villages Act, Ill. Rev. Stat. 1957, Ch. 24, §14-4, which requires that all police and fire department officers be appointed by the board of fire and police commissioners unless otherwise provided by ordinance.

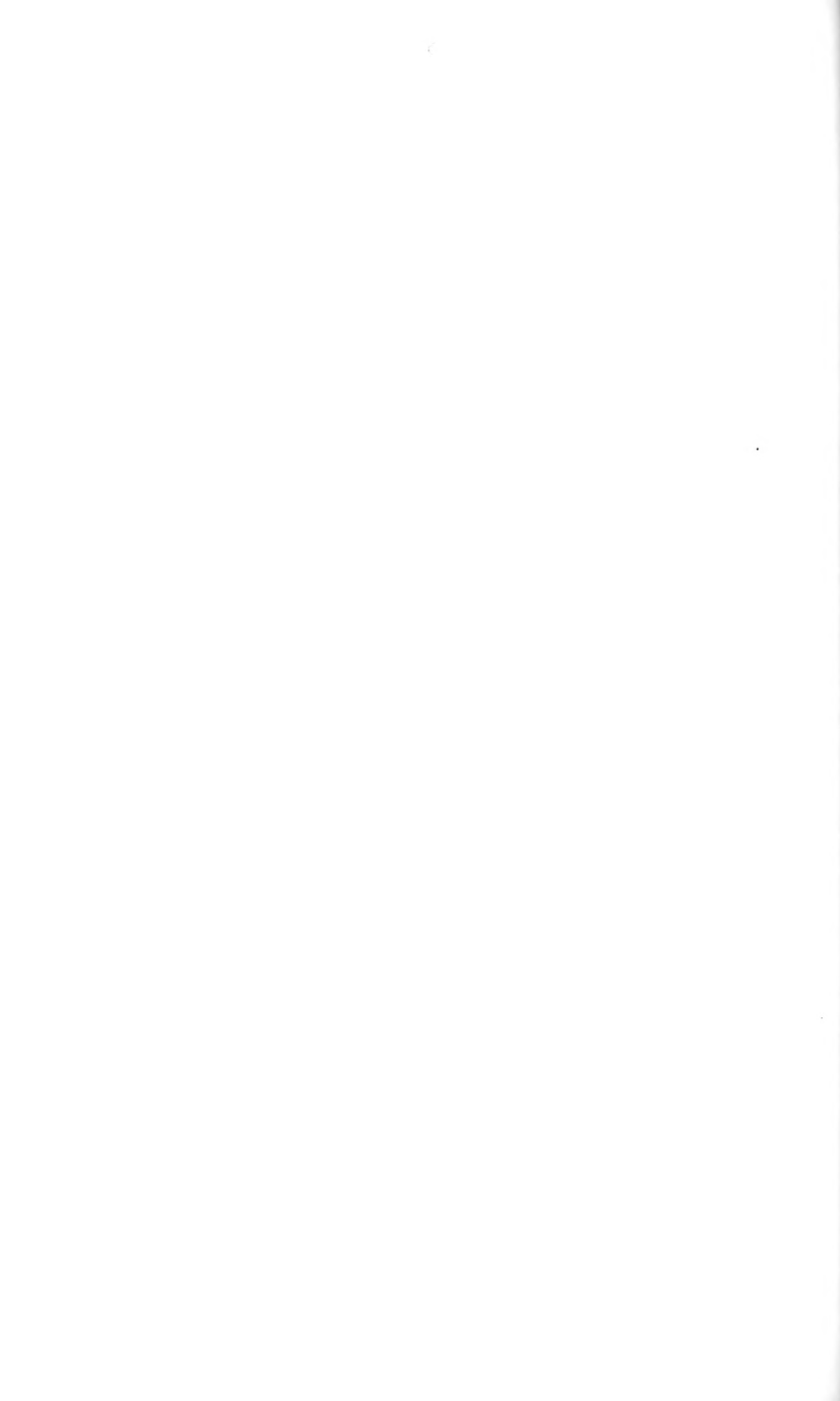
In November, 1957, the Village Board passed Village of Markham Ordinance # 359, providing that the chief of police be



appointed "by the President and Board of Trustees...and not by the Board of Fire and Police Commissioners." While this ordinance was never raised in the court below or in the briefs originally filed in this court, our Judicial Notice Act [Ill. Rev. Stat. 1957, Ch. 51, § 48(a), (b)] requires us to take judicial notice of it in this court. See Anderson v. Village Homebuilders, Inc., 401 Ill. 60. In our opinion this ordinance renders section 14-4 inapplicable.

Our courts, construing identical language, have said that it gives the president no greater voice in an appointment than any one trustee, and that his concurrence in these appointments is unnecessary. Lightfoot v. Village of Evergreen Park, 207 Ill. App. 411; McKean v. Gauthier, 132 Ill. App. 376; Rowley v. People, 53 Ill. App. 298. If the board of trustees was merely to confirm or reject the president's appointments, language such as that defining the power of mayors could easily have been used ("...all officers of any city shall be appointed by the mayor by and with the advice and consent of the city council." Ill. Rev. Stat. 1957, Ch. 24, §9-16).

In view of the long-standing interpretation which our courts have placed on such language and the ease with which the ordinance could have specifically required the president's concurrence in appointments, we think that the Markham ordinance gave the president no greater authority in appointing a police chief than it gave to any single trustee. We therefore hold





-3-

that plaintiff was validly appointed chief of police by a majority of the president and the board, voting jointly, even though the president did not concur in the appointment.

For the reasons given, the judgment is reversed and remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MURPHY, P.J. AND KILEY, J. CONCUR.

Abstract only.



47684

LOUIS GARGANO,

Appellant,

v.

WM. J. McNERNEY and WM. L. STEWART,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

22 I.A. 23 2031

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a libel and slander action. The trial court ordered that plaintiff's amended complaint be stricken and the action dismissed, and plaintiff appeals.

The original complaint was in two counts. In Count I, plaintiff alleged that during plaintiff's campaign for local office in Franklin Park defendant McNerney falsely and maliciously slandered him by telling a public meeting that, "The candidate for Trustee on the opposition ticket has a criminal record. I will show you his records from the Bureau of Criminal Statistics after the meeting." In Count II, plaintiff alleged that defendant Stewart, in furtherance of a conspiracy to libel plaintiff, gave defendant McNerney police records he had obtained; that McNerney printed and distributed facsimiles of these records among the village citizens; and that "among such records were the records of a Louis Gargano who was not the same person as the plaintiff."

This complaint was stricken and plaintiff's two count amended complaint was filed after the running of the



applicable statute of limitations. Count I of the amended complaint differed from the original by alleging that defendant McNerney said that "Louis Gargano, the candidate for Trustees, etc." The pertinent differences in Count II were that "records of arrest" were involved, that both defendants distributed the facsimilies, and that "among said facsimilies was one of a certain Louis Gargano, 'arrested for gambling'" who was not the same person as plaintiff. On defendants' motion, the amended complaint was stricken and the suit was dismissed.

The main issues in this court are whether the amended complaint is barred by the statute of limitations, and whether it fails to state a cause of action in that the statements are not slanderous per se and libelous per se.

Section 46 (2) of our Civil Practice Act, Ill. Rev. Stats. 1957, Ch. 110, §46(2) provides that an amended complaint will not be barred by a lapse of time if the original complaint was not so barred, as long as the cause of action asserted in the amended pleading "grew out of the same transaction or occurrence set up in the original pleading." Our Supreme Court has stated that this is the "sole requirement" and that "it is not necessary that the original pleading technically state a cause of action." Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222. Appellants contend that the amended complaint sets up new and different causes of action and will not relate back to the original complaint. There is no merit in this contention because the events or occurrences alleged in the



-3-

amended complaint are not distinct from those in the original complaint, and there is no new republication first alleged in the amended complaint as there was in Larkin v. Gerhardt, 21 Ill. App2d 122. Neither the insertion of plaintiff's name in the allegedly slanderous utterance of the first count nor the more specific reference to records of arrest rather than police records in the second count could reasonably be said to relate to a distinctly different transaction or occurrence. We therefore think that this amended complaint falls within the language and purpose of section 46, and is not barred by the statute of limitations.

Since plaintiff does not allege special damages, the two counts of his amended complaint must respectively show slander per se and libel per se in order to state a cause of action. Defendants argue that the statement that plaintiff has a "criminal record" is not slander per se, since the language does not impute to plaintiff the commission of a criminal offense. Wright v. F. W. Woolwerth Co., 281 Ill. App. 495. We think it does. The language need not impute the commission of a particular crime. Herhold v. White, 114 Ill. App. 186. The Herhold case presents a question similar to ours. There, the statement was that Herhold "is and has been behind bars." The court thought the statement imputed a crime because the meaning which would commonly be placed on such a charge was that Herhold had committed a crime for which he had been imprisoned. //





We think the same is true of the charge that one has a criminal record. Both of these cases differ from Trembois v. Standard Ry. Equipment Mfg. Co., 337 Ill. App. 35, cited by defendants and involving statements concerning arrest. To say that someone has been arrested cannot be construed to mean that he has been guilty of a crime; while it may injure him, it is not slanderous per se. We conclude Count 1 of the amended complaint alleges slander per se.

We think also that Count II sufficiently charges libel per se. See John v. Tribune Co., 19 Ill. App.2d 547. The Tribune had printed that the plaintiff had been arrested and charged with being the keeper of a disorderly house. This court said that it was "not open to question" that the language was libelous per se. The law of slander is more strict than that of libel. Wright v. F. W. Woolworth Co., 281 Ill. App. 495. "It is not necessary to charge one with a crime to make the charge libelous per se." Ogren v. Rockford Star Printing Co., 288 Ill. 405.

Defendants also contend that the material complained of is privileged and that plaintiff does not allege that the material in Count II is false. These points may be briefly disposed of. Plaintiff alleges that both publications were made maliciously, and if this is so, privilege will be no defense to defendants. Ogren v. Rockford Star Printing Co., *supra*; Jamison v. Rebenson, 21 Ill. App.2d 364. The Ogren case also makes clear that truth is a defense in a libel suit only when published "with good motives and for justifiable ends."



-5-

Plaintiff alleges that defendants knew that the record of arrest in Count II did not refer to him, but nevertheless published it with the intent to defame plaintiff by misleading others into thinking that it did refer to plaintiff. Consequently, this publication would be libel per se even if the statement was true.

For the reasons stated, the order of the trial court striking plaintiff's complaint and dismissing his action should be reversed, and the cause remanded.

REVERSED AND REMANDED.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.



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In the

APPELLATE COURT OF ILLINOIS

Fourth District

February Term, 1959

Patricia Matthews, as Administrator )  
of the Estate of Byron J. Matthews, )  
Deceased, )  
Plaintiff-Appellee, ) Appeal from the  
vs. ) Circuit Court of  
Charles Christoff and Russell Modglin, ) White County  
Defendants-Appellants. )

Honorable Roy O. Gulley, Judge Presiding.

Scheineman, P. J.

Byron J. Matthews lost his life as a result of colliding with the rear end of a truck owned and operated by the respective defendants, it being parked at night on a highway. His administrator brought this suit for damages and obtained a judgment upon a verdict for \$14,750.00 against both defendants. On this appeal the defendants contend the verdict is contrary to the manifest weight of the evidence, that the court erred in rulings on instructions, and that insurance was improperly injected into the case.

The situation was: defendants were operating a truck at night on a paved public highway; something



happened to the electrical system, the truck stalled on an up-grade and its lights failed. The deceased approached from the rear, collided with the standing truck, and died as a result of his injuries.

The complaint charged various acts of negligence, including violations of the statute, Chapter 95 1/2, Ill. Rev. St. It was alleged that defendants negligently permitted the truck to stand without putting out flares, in violation of Section 218; that defendants failed to signal or warn motorists approaching from the rear; failed to equip the truck with proper lights, in violation of Section 199; failed to park so as to leave 20 feet unobstructed, in violation of Section 185; parked on the pavement at night without lights, in violation of Section 202; parked in a traffic lane although it was practical to park off the pavement.

The defendants were barred from testifying because the plaintiff sued as administrator, so that their version of what happened is not given. Otherwise, the evidence consists largely of testimony of passing motorists and those who congregated after the crash. For the most part, their testimony is entirely consistent with a mechanical or electrical failure without fault on the part of defendants. As to some of the charges of negligence, a verdict of guilty could rest only on pure conjecture, while others are actually refuted.





There was no testimony that it was practical to park the truck off the highway at the place of the occurrence. On the contrary, one of the plaintiff's own witnesses stated that the truck might have parked off the highway before it got to the place it stopped, but at that point there was no room to park off the pavement. He had stated the shoulder was only two feet wide. A police officer said three feet.

A mechanic testified he had serviced this truck about 8 P.M. just before it started on the trip. His testimony indicates the truck was equipped with all the lights required by statute, plus the reflectors which supplement the lighting system in case of its failure. This evidence is uncontradicted. Plaintiff's witnesses merely testified that when they approached the truck, either the lights were not on, or, as most of them said, they were on but were very dim. Thus, some of the alleged violations of law were not merely unproved, but were disproved.

While these deficiencies in evidence seem to support the defense claim that the verdict is contrary to the manifest weight of the evidence, they are actually mentioned here only because of the effect on the instructions. In at least one aspect of the case, there was a proper jury question presented. This has to do with the failure to put out flares.



The defendant contends that the elapsed time between the stalling of the truck and the collision was so short, the driver could not get the flares placed in time to avoid the collision, therefore, the failure to set up flares was not due to any negligence. The plaintiff does not contend the defendants are liable in this respect, if there was not time to put out the flares, but does contend the evidence shows there was adequate time.

There is no direct evidence on the lapse of time, the plaintiff's theory is based on inference and calculation. A motorist traveling in the opposite direction came upon the darkened truck just as the driver dismounted from the cab on the left side, so that the motorist had to swerve to avoid striking him. This witness testified as to his speed after passing the truck and the approximate distance to a point where he met the deceased going in the same direction as the truck. He was acquainted with the deceased and regognized the car, which he states was traveling "less than 60." Using the estimated speeds and the distance, plaintiff calculates there was some 3 minutes elapsed between the time the defendant-driver was seen dismounting from the truck, and the time of the collision. Other testimony seems to make the distance shorter, which would lessen the time.



Others testified to seeing the truck driver running toward the rear of the truck before the collision. They did not see anything in the driver's hand. After the crash, a witness looked in the truck's tool box, but saw no flares there, and flares were furnished from other vehicles which arrived. The mechanic who had serviced the truck that night testified to having seen flares on the floor in the cab. There is no testimony that the flares were there or were not there after the collision.

Thus, the evidence presents close questions of fact as to whether flares were carried, and whether the driver had time, and made a reasonable effort, to put out flares or otherwise warn the approaching vehicle of danger. As such questions of fact, they are questions for the jury to decide, and this court finds no basis to hold that the jury's decision thereon is contrary to the manifest weight of the evidence, but it does appear the decision may have been the result of an erroneous instruction.

The point about insurance arose in this way: plaintiff filed a motion for leave to inquire on voir dire whether the jurors had any interest in a certain insurance company, with an affidavit to the effect there were jurors on the panel who were members of a mutual company defending the lawsuit. Defense counsel informed the court there were in fact six



jurors who were members of the mutual, and named them. What happened thereafter is not set forth in the record before this court, but there being no objections made concerning the voir dire, by either side, it may be assumed the six jurors were excused and the motion to inquire about interest in insurance was denied.

The point now raised by the defense is that, since the motion and affidavit were filed, they became public matters, and jurors might have examined them. It is the opinion of this court that the procedure followed was in accordance with the usual and customary practice, and that the possibility jurors might examine the files in a case they were to hear, is too remote to form the basis of a charge of prejudice, and the trial court properly overruled this objection.

As to the instructions, there were more than 20 given for the plaintiff, not counting the forms of verdict, and without any of the so-called "cautionary" instructions. Naturally, with such a volume in a case of simple issues, it is easy to point out the argumentative form of some of them, and the comments and slanted statements of law, which the attorneys might have made in their arguments but which should not come from the bench. One instruction was so obviously completely incorrect,



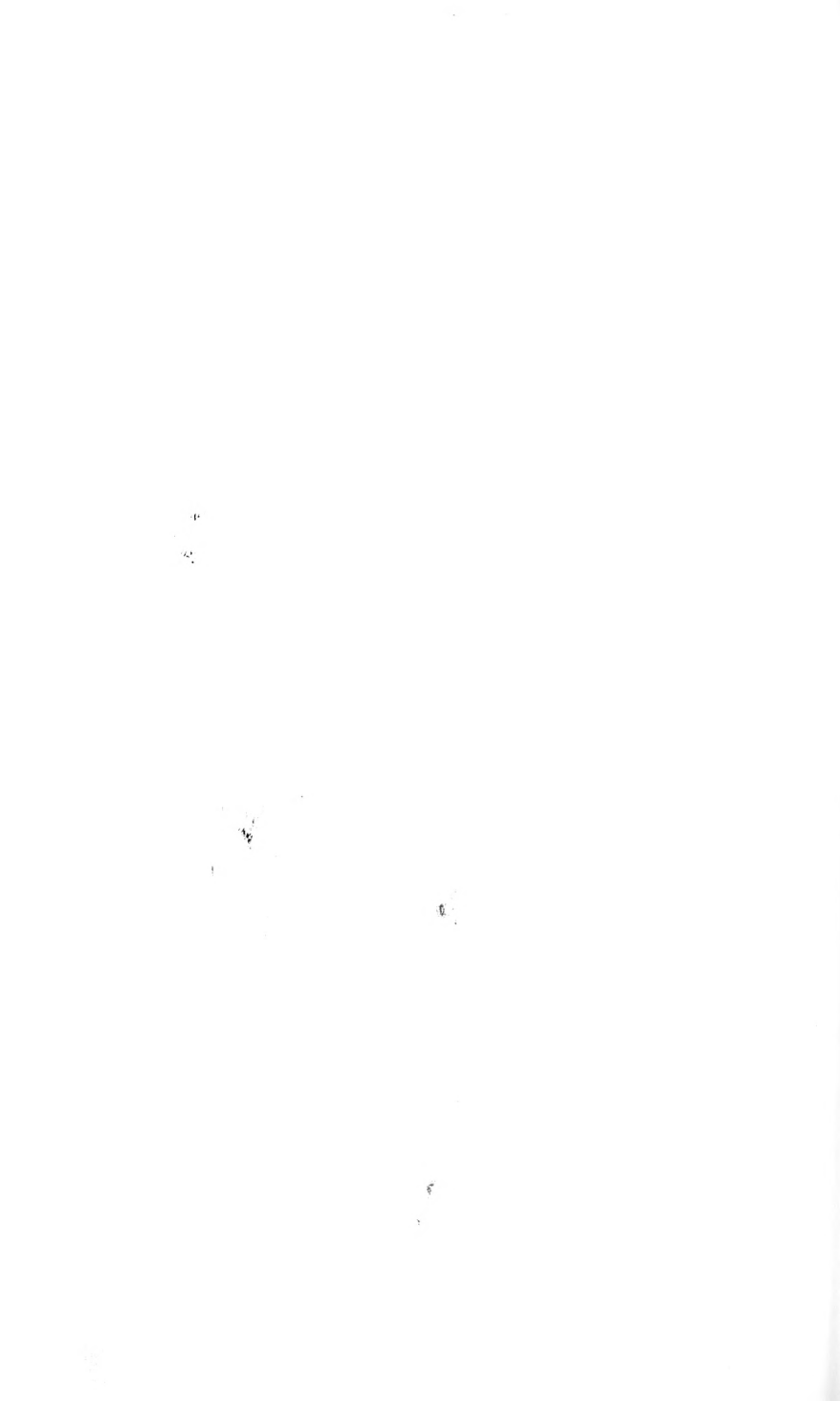


and necessarily misleading under the evidence, that it requires reversal. Accordingly, the numerous other objections need not be reviewed.

The plaintiff argues that the objection to the instruction at the conference thereon was not sufficiently specific to preserve the point for review. When an instruction is so completely wrong, such as putting the burden of proof on the defendant to show that he was not negligent, there is little that can be said about it, other than a general objection, so that the judge's attention is directed to the incorrect rule of law. It is therefore held that the objection in this particular instance was sufficient.

Plaintiff's given instruction number 2 was as follows: "The Court instructs the Jury that in this case the burden of proving that truck driver, Charles Christoff, did not have time to exhibit or place flares after Defendant's truck stopped and before Byron J. Matthews' auto collided with it, is upon the Defendants and the burden is not on the Plaintiff to show that Defendants had time in which to exhibit or put out flares:

"If Defendants have failed to satisfy such burden by proving to you by a preponderance or greater weight of the evidence that they did not have sufficient time in which to exhibit or place such



flares after the truck stopped and before the collision, then you may find said Defendants, and each of them guilty of negligence as charged in Plaintiff's Complaint."

The foregoing is not a correct statement of law, and should not have been given. The true rule which frequently is applied, is that the burden of proof never shifts to the defendant, but in many cases, after the plaintiff has made a prima facie case, the defendant may have the burden of going forward with evidence. This principle arises where the plaintiff is asserting something in negative form, also where the facts may be peculiarly within the knowledge of the defendant.

The rule on burden of proof is thus stated in Cleary, Handbook of Illinois Evidence, p.70, Sec. 612: "The burden of proof has two aspects (1) The burden of producing evidence as to a particular matter, and (2) The burden of persuading the trier of fact as to the existence thereof."

"The burden of producing evidence may shift from party to party as the case progresses, but the burden of persuasion never shifts." (Citing, Egbers v. Egbers, 177 Ill. 82, 52 N.E. 2nd 232.)

In Smith v. Metropolitan Life Ins. Co., 317 Ill. App. 624, speaking of this burden of evidence, the court says: "This presents an issue of fact for the jury, but it does not alter the onus probandi or



relieve plaintiff from proving by a preponderance of the evidence the facts which he has alleged in his complaint and upon which he must rely for recovery.'

The following is from 53 Am. Jur., Trial, Sec. 676: "An instruction placing the burden of proof on the wrong party, or placing on one party an unwarranted burden, is misleading and erroneous, and may properly be refused. The giving of such an instruction constitutes ground for reversal, unless it relates to an issue or question which is immaterial. This objection is applicable to an instruction \*\*\* erroneously requiring the defendant to adduce a preponderating quantity of evidence to defeat the plaintiff's prima facie case."

Cited in the above section is McCloskey v. Koplar, 329 Mo. 527, 46 S.W. 2d 557, which contains this explanation: "The reason that an instruction which places the burden of proof on the wrong party is prejudicially erroneous is that it puts the risk of non-persuasion or the duty of convincing the jury by the greater weight of the evidence, on the opposite party, who, according to law, has the right to prevail even if the evidence is merely in equipoise so that the jury are left in doubt."

This general subject is further discussed in



18 ILP, Evidence, Sec. 21; 35 ILP, Trial, Sec. 216; 38 Am. Jur., Negligence, Sec. 363; 29 ALR 2d 1390; IX Wigmore on Evidence, Sec. 2487, et seq. The authorities are all in agreement on this subject, save one Illinois case, relied upon by plaintiff. For that reason we have cited and quoted authorities extensively.

The case cited by plaintiff is Piper v. Speroni, 317 Ill. App. 540, 47 N.E. 2d 120, an abstracted opinion. We have examined the full opinion and find it involved a truck stalled on the highway at night without lights or flares, and contains the statement "We think the burden of proof was not upon the plaintiff to show that Defendant's servants had time to put out flares, but was upon the defendant to show that they did not have time to put out flares after the car stopped and before the collision occurred."

That case did not involve a death, the plaintiff was suing for personal injuries, so that the defendants were competent to testify in their own behalf, and did so. The plaintiff had charged the truck was parked there in the dark for a half hour, which was denied, but when the defendant driver was on the stand, he admitted it had been there for some minutes, during which time he had made no effort to put out flares. This was direct





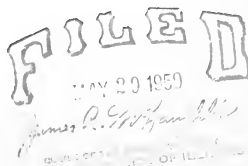
evidence on lapse of time, and it was in the comment arguendo on it that the opinion made the quoted statement. The opinion had also noted that there was an adequate shoulder, 14 feet wide at the place, where the truck could have been parked. This court can agree with the result in that case, but not with the erroneous statement as to the burden of proof.

In the case at bar, if the defendant driver did not have time to put out flares, he was not guilty of negligence in that respect, and there was little else to constitute a case of liability. He could not testify himself, but was entitled to fair consideration of other competent testimony, as to whether he had been negligent, and the plaintiff has the burden of proving his negligence. As noted above, the time was short and the evidence presented a close question of fact. If the jury was in doubt, the plaintiff had failed to carry his burden of proof, yet the instruction in that event authorized a verdict of guilty. For this error the judgment must be reversed and the cause remanded with directions to grant the motion for new trial.

Reversed and Remanded.

Culbertson, J., concurs.

Publish Abstract Only.





815  
47765

AGNES HALDASH, also known as  
AGNIESZKA HALDAS,

Appellee,

v.

MARY WIDLAK, STEVE WIDLAK and  
IGNACY HALDAS,

Appellants.

\_\_\_\_\_  
IGNACY HALDAS,

Counter-plaintiff-Appellant,

v.

AGNES HALDASH,

Counter-defendant-Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

23 I.A.<sup>2d</sup> 313

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered on the pleadings, striking and dismissing the counterclaim in a partition suit, and continuing the hearing on a petition for injunction. The trial court found there was no just cause for delaying enforcement or appeal.

The premises consist of a 3-story apartment building in Chicago, Illinois. The principal controversy is between plaintiff, Agnes Haldash, and her husband, defendant Ignacy Haldas, who have been married for over forty years. Title to the premises was held by them in joint tenancy from 1924 until 1958, when Ignacy conveyed to their daughter, defendant Mary Widlak, an undivided one-half interest, reserving to himself a life interest.



Plaintiff and her husband, Ignacy, occupied the second apartment until April, 1957, when he moved to a home for the aged. Defendant Mary Widlak and her husband, defendant Steve Widlak, occupy the third floor. The first floor is occupied by a tenant, defendant Rose Raisek. The pleadings disclose no other parties in interest.

The complaint describes the premises by a conventional lot and subdivision description, and also includes a general description of the improvements, with street address, city and state. The interests of the parties are described as an undivided one-half interest in fee simple in plaintiff; an undivided one-half interest in fee simple in Mary Widlak, subject to the life estate of Ignacy, her father; an inchoate dower interest in Steve Widlak, husband of Mary; and a month-to-month tenancy in Rose Raisek. Plaintiff alleges the taking by Ignacy of their joint savings, the result of their joint work for more than forty years, and that his conveyance to their daughter Mary "was without consideration and in fraud of plaintiff as a creditor \* \* \* subject to plaintiff's claim against Ignacy Haldas." She prays for a partition or sale; that their respective rights be determined; that the conveyance from Ignacy to Mary be declared "void insofar as it defeats plaintiff's rights as a creditor"; and for general relief.

The Widlaks and Ignacy answered jointly. They admit the allegations describing the premises and the interests of the parties concerned; deny the taking by Ignacy of the joint savings;



and allege that as a result of plaintiff's threats to Ignacy, he delivered plaintiff \$4300 in currency and \$4500 in savings bonds, his lump sum pension, after which she evicted him.

Ignacy, alone, counterclaimed, seeking partition of the same premises and for an accounting of their life savings; and petitioned for an injunction to restrain plaintiff and various other persons and corporations from withdrawing funds from two loan associations and from entering a safety deposit box.

Plaintiff moved to strike and dismiss the counterclaim, because the complaint and answer were sufficient to put at issue both the partition and accounting suits and to determine all the rights of all the parties to the suit. Subsequent to permitting plaintiff to amend her complaint by correcting part of the subdivision description, the court sustained plaintiff's motion and dismissed the counterclaim, and continued the petition for injunction to the final hearing of the cause. The instant appeal is from that order, entered on March 23, 1959.

The principal question is whether the complaint and answer are sufficient to secure for defendants a full and complete hearing on the partition and accounting issues and affirmative relief, if warranted.

Defendants contend that the error in the description of the premises was jurisdictional and, although the complaint was amended later so as to correct the description, the counterclaim was the first pleading to give the court complete juris-





diction of the subject matter; and that the trial court should first proceed under the counterclaim as to the personal property in question, before proceeding on the partition suit, as Ignacy, as counterclaimant, may be awarded more than the value of plaintiff's interest in the real estate and make a partition unnecessary.

In partition suits, "the complaint shall particularly describe the premises sought to be divided, and shall set forth the interests of all parties interested therein." (Ill. Rev. Stat. 1957, Ch. 106, par. 45.) Errors in describing the premises can be serious. In Tagert v. Fletcher, 232 Ill. 197, it was said that "966 West Lake Street" had no legal meaning as descriptive of any particular tract of ground. In Winemiller v. Mossberger, 355 Ill. 145, the court said that the complainants did not acquire the control of the partition suit, because the bill lacked necessary parties, and it was proper for a defendant to file a cross-bill, which the court held was the first pleading that gave complete jurisdiction of the subject matter and parties, and that the original bill and answer were not sufficient for doing complete justice.

The Illinois rule in real estate description controversies is, that any description by which a parcel of property may be identified by a competent surveyor, with reasonable certainty, is sufficient. Brunotte v. DeWitt, 360 Ill. 518 (involving an easement); Bimslager v. Bimslager, 323 Ill. 303 (will construction); People v. Southern Gem Co., 332 Ill. 370 (tax sale).



We believe the description contained in the complaint, before amendment, was sufficient, when filed, for the court to acquire jurisdiction of the premises sought to be divided. It contained the lot number, two subdivision names (P. Henry Brockway's Subdivision of the East one-half (E 1/2) of Lot Fifteen (15) in Joy and Frisbie's Subdivision of the East half (E 1/2) \* \* \*), the section, township, range and county. The street address, city and state were set forth in a separate paragraph. The description error (northwest quarter (NW 1/4) instead of northeast quarter (NE 1/4)) could not have caused defendants any difficulty in identifying the premises. It is apparent that in spite of this error in description, the premises can be identified with reasonable certainty.

Where, as in the instant suit, an accounting is necessary to grant the complete relief sought in the complaint, neither a counterclaim nor a specific prayer of the answer is necessary for affirmative relief in favor of defendant; "the action is construed as if each was a party in the bill against the other." Judson, et al. v. First Trust & Savings Bank, et al., 238 Ill. App. 531, 536, (1925); Seybert v. Hoiles, 279 Ill. App. 110, 114 (1935).

We conclude that defendants' counterclaim introduces no substantially new matter, and the trial court can properly decide the issues on the complaint, as amended, and the answer. (29 I.L.P., §39 (Partition).) We believe the chancellor properly exercised his discretion in striking and dismissing the counterclaim.



Defendants fail to point out or argue as to wherein the court erred in continuing the petition for injunction. The record indicates no abuse of discretion by the chancellor, nor possible injury to defendants. If, on the accounting issue, defendant Ignacy should be awarded affirmative relief, we assume it will be in the form of a decree for money against plaintiff, which would be a lien on her lands.

We believe substantial justice will be accomplished in this action to all parties in interest, without a counter-claim, and for the reasons given, the entire order of March 23, 1959, is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

ABSTRACT ONLY.



47703

LORRAINE J. SOBELMAN,

Plaintiff - Appellant,

v.

SHIRLEY CALIENDO and MICHAEL  
CALIENDO,

Defendants - Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

25 PA. 211<sup>21</sup>

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago entering summary judgment for defendants.

Plaintiff filed her amended complaint in October, 1958, alleging that her deceased husband "owned, possessed, managed and controlled" certain real estate, that upon his death it passed to her and her two minor children under our laws of intestate succession, and that she continued in possession, management, and control of the property until it was sold in May, 1958. She further alleged that defendants, the deceased's sister and her husband, fraudulently convinced plaintiff that the property should be sold and that they would sell it and give the proceeds to her; that she therefore gave them her permission to sell it; and that they then sold it for about \$9800 but have refused to give her the proceeds, instead converting them to their own use.

Defendants filed no answer, but moved for summary judgment on the basis of an affidavit sworn to by their lawyer. This affidavit states that plaintiff, by deposition, "admitted in answer to various questions" that title to the property was





in the name of one of the defendants at the time of plaintiff's marriage to the deceased, and that "by the admissions made in the deposition" plaintiff never had title or any vested interest in the property. The deposition referred to does not appear anywhere in the record, nor is there any more specific reference to plaintiff's claimed admissions. The affidavit also states that neither plaintiff nor her deceased husband had title to the property at the time of their marriage or at any time afterwards.

Plaintiff then filed a sworn counteraffidavit which, in view of our disposition of this case, we need not summarize here. On the basis of the amended complaint and two affidavits, the trial court entered the summary judgment and plaintiff appeals.

Defendants first contend here that, since plaintiff admitted she had no title to the property, this can only be an equitable action to declare a constructive or resulting trust; and that since the Municipal Court of Chicago has no jurisdiction to grant equitable relief, they have no jurisdiction of the subject matter of this suit. Assuming that plaintiff's right to recover may be predicated upon some trust theory, we do not agree with defendants' conclusion regarding the lower court's jurisdiction. Where one receives money belonging to another under such circumstances that in good conscience he ought not be allowed to keep it, either equity or law may grant relief, the former by the imposition of a constructive trust, the latter on the basis of a quasi-contract, or contract implied in law.



Board of Trustees v. Village of Glen Ellyn, 337 Ill. App. 183.

Even the beneficiary of an express trust is not limited to seeking an accounting in equity if there is a breach of the trust, but may sue his trustee at law for fraud, misrepresentation, or conversion, Piff v. Berresheim, 405 Ill. 617, just as an agent may be sued at law for a breach of his fiduciary duty, Fidelity Trust Co. v. Poole, 136 Ill. App. 266. Suits at law by beneficiaries against trustees or their agents have been allowed in the Municipal Court of Chicago in Moran v. Union Bank of Chicago, 352 Ill. 503, and Liebundguth v. Firebaugh, 309 Ill. App. 447.

We also think that the affidavit of defendants' attorney is insufficient to support a summary judgment for defendants. Rule 2, Section 15 of the Municipal Court Rules is identical with Rule 15 of the Supreme Court Rules, Ill. Rev. Stat. 1957, Ch. 110, § 101.15. It provides that:

"Affidavits in support of and in opposition to a motion for summary judgment, and affidavits under section 48 of Rule 1, shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

Affiant's statement that neither plaintiff nor her deceased husband had title to the property at or since their marriage is merely a conclusion of law and must be disregarded. See



Chicago Title & Trust Co. v. Cohen, 284 Ill. App. 181. Nor do we think his statements concerning plaintiff's claimed admissions comply with the rule. The affidavit must show with particularity facts admissible in evidence which the affiant, if sworn as a witness, could competently testify to; it is examined as if it represented his oral testimony on the witness stand. Fisher v. Hargrave, 318 Ill. App. 510. The affiant's conclusions do not meet these requirements. Because we are remanding this cause for further proceedings, we might also point out that a party's extra-judicial admissions are not conclusive, but should be considered with the other evidence. Casey v. Burns, 7 Ill. App.2d 316.

For the reasons stated above, the order of the Municipal Court of Chicago granting defendants summary judgment and costs is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.



819  
47742

TONI RADKE,

Appellee,

v.

CHARLES J. FLECK, as Public  
Administrator of the Estate of  
Alexander Weimerst, deceased,  
and Unknown Heirs and Devisees  
of Alexander Weimerst, Deceased,

Defendants.

On Appeal of COUNTY OF COOK, a  
body politic and corporate,

Appellant.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED THE  
OPINION OF THE COURT.

This appeal is taken by the County of Cook from a decree  
of the Circuit Court of Cook County entered in favor of the  
plaintiff in a suit to enforce specific performance of an  
alleged agreement to make a will in favor of the plaintiff.

The suit was filed by Toni Radke, plaintiff, against  
Charles J. Fleck, administrator of the estate of Alexander  
Weimerst. Alexander Weimerst died April 21, 1957. He was  
an elderly man, approximately 70 years old. His wife had  
died in 1948. He had no children nor any other relatives.  
At the time of the death of his wife he lived with her in a  
third floor co-operative apartment owned by him at 67th  
Street and Crandon Avenue in the City of Chicago, which he  
retained as a residence until the time of his death. For  
about 30 years the deceased had been a friend of the plain-  
tiff and her husband, Fred W. Radke.





In the complaint the plaintiff alleged that the deceased had, after the death of his wife, told the plaintiff that since he had no relatives to whom to give his estate, if plaintiff would take care of him, serve him meals and allow him to sleep at the plaintiff's home whenever he so desired, he would make a will leaving all of his estate to the plaintiff, to which the plaintiff thereupon agreed, and she further stated that if he desired he might move into the apartment with the plaintiff and her husband and live with them as one of the family. Plaintiff also alleged that on the Saturday preceding the date of his death, while apparently in good health the deceased told plaintiff that he had all of his affairs in order and was going to give up his apartment and come and live with plaintiff and her husband in their home, and at the same time he gave the plaintiff keys to his safety deposit vault and keys to his apartment. The complaint alleges that she fully performed the conditions of the agreement and that the deceased failed to execute a will leaving his estate to the plaintiff.

The public administrator had entered an appearance on behalf of himself as administrator of the estate of Alexander Weimerst, and for unknown heirs and devisees of the deceased. An appearance was also subsequently filed by the State's Attorney of Cook County on behalf of the County and unknown heirs. The defendant Fleck filed an answer to the complaint, as did the State's Attorney of Cook County. No petition for intervention was filed by the County, nor was there any order



of the court entered making the County of Cook a party to the suit. The case was heard before the court without a jury, and at the hearing attorneys representing the plaintiff and the public administrator, together with an Assistant State's Attorney, were present. The court at the conclusion of the hearing entered a decree in which the court found, among other things, that Alexander Weimerst had died on April 21, 1957 with no known heirs; that the deceased, after January 27, 1948 (the date of death of his wife), became a constant visitor at the home of the plaintiff; that the deceased from that date until the date of his death lived in the home of the plaintiff and her family, was treated as and given all the privileges of a member of the family; that in July of 1951 the plaintiff agreed with the deceased that she would permit him to come and go as a member of her family in return for his promise to make his will leaving all of his property to the plaintiff; and that the plaintiff fulfilled her part of the agreement, but that the deceased died intestate and made no will leaving any of his property to the plaintiff.

The evidence shows that the deceased was frequently at the home of the plaintiff; that a sleeping room was reserved for him; that at any time when the plaintiff's family visited elsewhere he accompanied them and whenever they entertained company at their home he was present; that he was at the house of the plaintiff three or four times a week and frequently stayed overnight; that he made himself feel at home, ate and slept there and became a companion of the members of the household; that the plaintiff



-4-

cooked for him and occasionally washed and ironed his clothes; and that if he was sick she would take care of him. A number of pictures were introduced in evidence showing the deceased present at various dinners and other family gatherings. The evidence also showed that deceased had a key to the home of the plaintiff, which had been given to him approximately a year or two before he died, and that the plaintiff received no reimbursement whatsoever from the deceased. Herbert G. Immenhausen, attorney for the plaintiff, testified that after the death of Mr. Weimerst the plaintiff came to his office, gave him a key for a safety deposit box maintained in the name of Weimerst and told him that Weimerst had given her the key before his death.

The County of Cook here asks that the decree be reversed and the case remanded to the trial court with instructions that the court dismiss the complaint for want of equity, on the theory that the plaintiff did not sustain her burden in proving the existence of the alleged contract, and alternatively that the plaintiff had an adequate remedy at law.

The plaintiff in her brief urges that since the appeal was taken by the County of Cook it should be dismissed since the County of Cook was not properly made a party in the trial court, and if it was not a party its interest in the case is too remote to support an appeal. It is true that the County of Cook, without taking any steps to permit it to intervene, had filed an appearance in the trial court. No order making the County a party was entered in the trial court. We express



no opinion on what the position of the trial court should have been if such a petition for intervention had been filed. However, it appears from the record that the County, through the State's Attorney, filed an answer, that the trial court at the hearing was informed of that fact, and that an Assistant State's Attorney appeared and participated in the hearing without any objection on the part of the plaintiff. All proceedings in the case, after the County had filed its appearance, were carried on as if a proper intervention order had been entered. In the decree the court found that the State's Attorney had entered an appearance in behalf of unknown heirs of the deceased and the County of Cook. The objection to the participation of the County of Cook as a party in the proceedings was not raised in the trial court and cannot be raised here for the first time. People v. Silver Plate Company, 388 Ill. 534.

The rules governing the essentials which would entitle a plaintiff to specific performance of an alleged agreement by a person, since deceased, to leave property to the plaintiff have been laid down many times by the Supreme Court. In Linder v. Potier, 409 Ill. 407, the court reiterates the rules and says:

"The principle of these early cases has never been departed from, although different states of fact have been presented where performance was decreed by a trial court, sometimes on what appears as rather slight evidence, and sustained by us out of our reluctance to overrule a chancellor who has seen and heard the witnesses. In Yager v. Lyon, 337 Ill. 271, we again voiced the cautionary rules applicable to this class of cases, and stated in detail the principles which would govern an





action and right to recover in cases of this character. In that case we announced the following applicable principles: (1) Courts of equity accept with caution evidence offered in support of a contract to make disposition of the property of a deceased person different from that provided by law; (2) The contract to support it must be clear, explicit and convincing; (3) The contract may be based upon services, support and care, and if the value of such services may be estimated in money, or for which a recovery might be had, such performance will not take the contract out of the Statute of Frauds, except in case the statute of limitations bars recovery, or where services cannot be adequately compensated; (4) Specific performance is not a matter of right, but rests in the sound discretion of the court, to be determined from all of the facts and circumstances; (5) It is only on the principle that it is unjust and inequitable to permit a contract to remain unexecuted that a court of equity will grant relief, and where the promisee shows no substantial change for the worse in his position in consequence of the agreement, relief will be denied."

In the case before us the only evidence appearing in the record is testimony of witnesses on behalf of the plaintiff. With reference to the contract five witnesses testified, and of the five, three were entirely disinterested. Leonard Sutherland, who was a friend of both the deceased and the plaintiff, testified that in 1956 the deceased in his presence told the plaintiff that she had taken good care of him and would do so in the future, and that he agreed that everything he had was hers. The witness further testified that the deceased told him that he had no family; that the plaintiff was all he had; that the plaintiff had been good to him; that he made his home there; that he had agreed that she would have everything and that the plaintiff in return was to take care of him; that in time if he wanted to he could move into the plaintiff's home entirely, but that he liked to be independent. The witness



also testified that the relationship between the deceased and the Radkes was a very fine one, and that he thought for some time that the deceased was a very close relative of either Mr. or Mrs. Radke.

Leon Dukette, also a friend of both the deceased and the plaintiff, testified that in November of 1953 the deceased told the witness that he had no relatives; that he slept and ate at the Radke home as he wished; that he had a great affection for the family; and that he had agreed with Mrs. Radke that if the association continued and he was cared for until his death he would will all his property to Mrs. Radke.

Martha Raab, who had known the plaintiff for 35 years and the deceased for a couple of years, testified that in August of 1955 the deceased told her that he had his will fixed so that the plaintiff would get everything when he died because she always took good care of him; that he intended to make his home with her and it would not be long before he moved into plaintiff's home; that he told the witness that he would leave his property to Mrs. Radke if she would take care of him and that she agreed; and that the deceased on another occasion told her that he would give the plaintiff everything in one lump and that his own daughter could not be any better to him than the plaintiff was.

Fred Radke, son of the plaintiff, testified that in August of 1956 he heard a conversation between the deceased and the plaintiff and that the deceased said that for services which the plaintiff had been rendering to him in taking care of him, feeding him,



washing his clothes and things like that, he would leave his entire estate to her; that in January of 1956 he made the same type of statement and said he had made a will and that the plaintiff would receive his entire estate on his death; and that in May, 1956 he again made a statement of similar import.

Paula Radke, the daughter-in-law of the plaintiff, testified that in May of 1954 the deceased told her that he had made an agreement with the plaintiff that if she would take care of him until he died he would leave her all his property; that again in November of 1954 he said he was glad he made the agreement with the plaintiff and that she certainly was taking good care of him; and that she furnished him meals and a place to sleep.

The County contends that there was no evidence fixing the time of the agreement. Paula Radke testified that the deceased had told her that the agreement was made shortly after the witness' husband had gone into the army in 1950 or 1951. That testimony fixes the date of the agreement with sufficient accuracy and is in substantial accord with the finding of the court in its decree that the agreement was made in 1951. The further finding of the court that the agreement was entered into in the month of July may be disregarded.

An agreement of this kind, since the plaintiff is prohibited by the statute from testifying in her own behalf, can generally be proved only by circumstantial evidence. In this case we not only have strong circumstantial evidence but we have the direct evidence of five witnesses that there was an



agreement that the deceased would make a will leaving all of his property to the plaintiff in consideration of her admitting him to her home, furnishing him meals and sleeping quarters, taking care of his clothes, and accepting him as a member of the family. These statements in the record go far beyond mere expressions of a testamentary intent. The evidence supporting the making of a contract is clear, explicit and convincing. There is no inherent improbability in the testimony which would tend to impeach any of the witnesses. In addition the trial court heard them, observed their demeanor on the witness stand, and by its decree indicated that it believed them.

The uncontradicted testimony is that the deceased made the home of the plaintiff his second home and that he was treated as a member of the family. When we consider that the deceased, an elderly man alone in the world without relatives, was taken into the home of the plaintiff, in every respect was treated as a member of the family, and participated in all of their activities, such a relationship cannot be measured in money terms. The plaintiff had no remedy at law which would provide adequate compensation. As a further support for the intervention of a court of equity the statute of limitations had run with reference to some of the services rendered since the evidence shows that the agreement was made in 1950 or 1951.

The plaintiff offered as a witness Fred W. Radke, her husband. The court permitted him to testify subject to the objection of the defendant County of Cook and its motion to strike. The objection





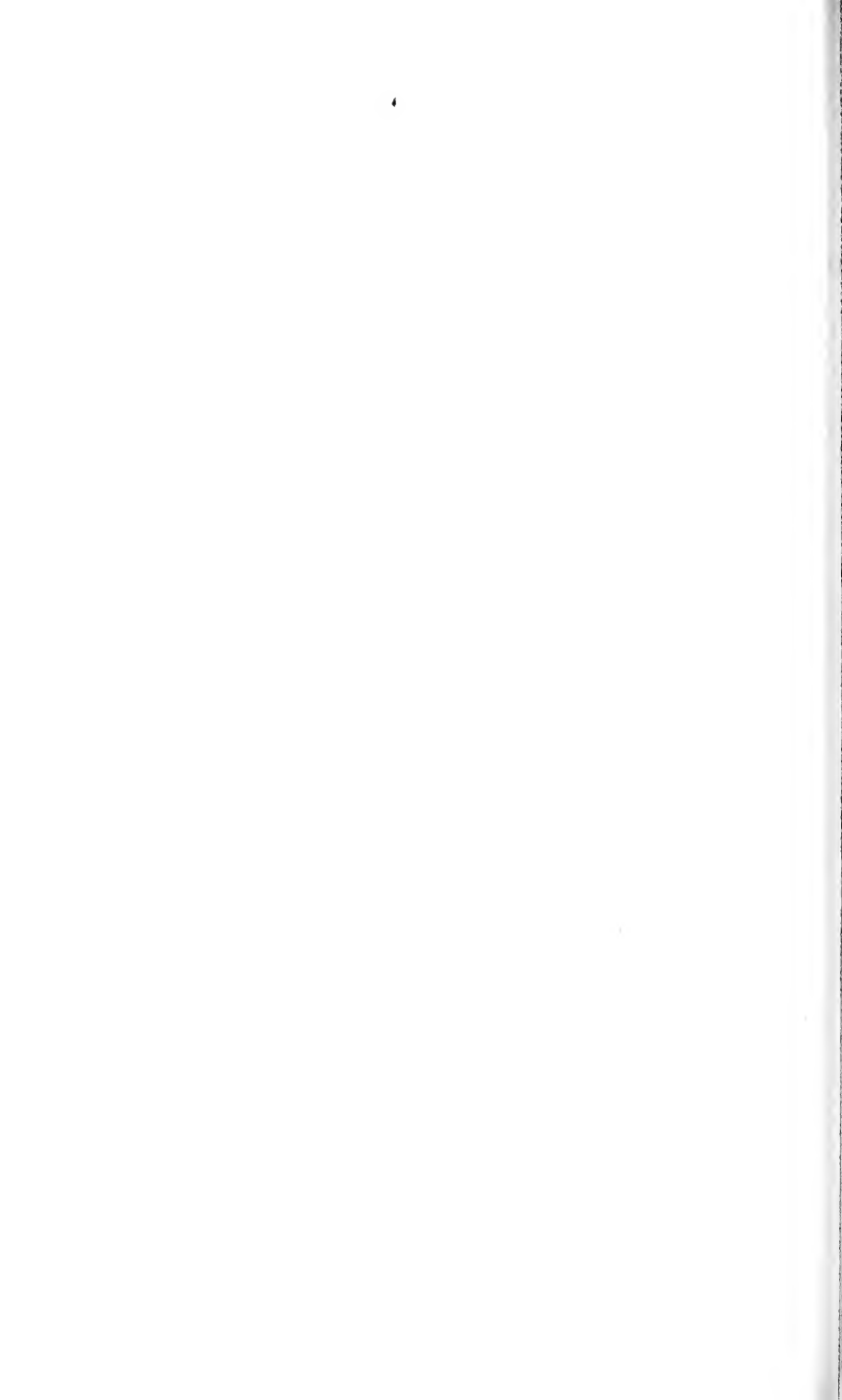
was made on the ground that he was an incompetent witness under section 2 of the Evidence Act. Subsequently on said defendant's motion the court struck his testimony from the record. In her brief the plaintiff argues as a "cross-error" that this ruling of the court was improper. The evidence in the record is sufficient to sustain the decree rendered by the court in favor of the plaintiff without the testimony of Fred W. Radke; hence it is not necessary to consider or pass upon the argument with reference to "cross-errors" or to determine whether they were properly raised.

The decree of the Circuit Court of Cook County is affirmed.

Affirmed.

Dempsey, P. J., and Schwartz, J., concur.

Abstract only.



16

47640 )  
47641 ) Consolidated.  
47642 )

CITY OF CHICAGO, a municipal  
corporation,

Appellee,

v.

HYMAN GOLDSTEIN,

Appellant.

A

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

201A<sup>2d</sup>815<sup>2</sup>

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION  
OF THE COURT.

In three separate cases the defendant was fined for violations of the Municipal Code. He took an appeal in each case, and in this court the appeals were consolidated. The only point made in defendant's Points and Authorities, which constitutes his assignment of errors in this court, goes to the adequacy of the complaint.

The first page of each of the complaints is obviously a printed form, reciting the sections of the Municipal Code claimed to be violated and the amount of the penalty sought. In the body of the complaints, after the printed words: "...plaintiff complains against the defendant as follows:" are the typed words "See Attached" and attached to the complaints are paragraphs headed "Counts 1, 2, 3," etc. In these counts the defendant is advised with particularity the address of the premises involved, the particular sections of the Municipal Code which it is charged were violated, and then, in detail, the nature of the violations as, for



example, in Count 1 in the appeal in Cause No. 476408:

Count 1. Defendant did on or about Sept. 23, 1957, own, or maintain, operate or control the building or premises located at 1653-59 W. Washington Blvd., Chicago, Cook County, Illinois, in an unsanitary condition and in a way or manner which endangers the health and safety of a person or persons, in violation of Section 83-48 of the Municipal Code of Chicago, in that said defendant failed to provide approved type ballcock for one water closet tank on the 2nd and 3rd floor and approved type faucet for bathtub on 2nd and 3rd floors at 1655.

The complaints are set forth in simple language and without ambiguity. Indeed, they are so clearly stated that one who runs may read. The defendant was adequately advised of the nature and cause of the accusations against him. The fact that they are on forms attached to the subscribed first page does not render them defective.

While defendant in his Points and Authorities does not make a point of error on the alleged demand for a jury trial or for a continuance to enable him to engage counsel, he discusses these matters in his argument. It clearly appears from the record that defendant did not ask for a jury trial at the time the cases came up, nor did he at that time ask for a continuance in order to obtain counsel. Defendant had ample time to do this between the time of the service of summons and the time the case came to trial. The record recites that defendant was advised of his right to trial by jury and that by agreement the cause was submitted to the court without



-3-

a jury and, as a matter of fact, defendant himself admits that he did not then ask for a trial by jury. Defendant states that his mentality was dulled and his speech "sort of tied." The record shows that the complaints were filed January 20, 1958, and that the trials took place February 28, 1958. In that period defendant had ample time to file an answer and make a jury demand. The Civil Practice Act provides that "a defendant desirous of a trial by jury must file a demand therefor not later than the filing of his answer. Otherwise, the party waives a jury." (Ill. Rev. Stat. ch. 110, section 64(1) (1957).) A similar provision is contained at section 64(1) of the Civil Practice Rules of the Municipal Court of Chicago. An action for violation of a city ordinance is civil in procedure. Village of Maywood v. Houston, 10 Ill. 2d 117, 139 N.E.2d 233 (1956). A defendant charged with violation of a city ordinance must make his demand for a jury trial before the hearing is commenced, and not wait until a motion for a new trial is made. City of Chicago v. Bonn, 328 Ill. App. 581, 66 N.E.2d 486 (1946) (memorandum decision).

Defendant in his Points and Authorities did not make a point of the fact that the trial court heard all three cases at the same time without an order of consolidation. He commented on the fact, however, in his argument. We are therefore taking notice of it. The record shows that





-4-

there were three separate trials, each with its own judgment. The fact that the trials took place on the same day does not mean that they were consolidated. We see no error in this case.

Judgment affirmed.

Dempsey, P.J., and McCormick, J., concur.

Abstract only.



812

1

~~~~~

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

 $V_0$ 

)

Appellants.

23 I.A.<sup>21</sup> 316

This is an appeal from a judgment on verdict for \$500. Plaintiff's suit is against her landlord. She claims that as she was walking downstairs from the leased premises, she took hold of a handrail which broke and caused her to fall. She charges that the handrail had been defective for some time. It is a close question. Two disinterested witnesses disputed Plaintiff's testimony. Her own testimony had some marked contradictions. We would not be justified in reversing on the ground that the verdict is against the manifest weight of the evidence, but one of the points made is that the jury was swayed by the prejudicial argument of plaintiff's counsel, and on this it is necessary to reverse and remand.

Plaintiff's lawyer, in arguing to the jury, referring to the landlord's testimony, said:

...it only goes to show the defective condition of the stairway, what conditions people have to live in when a landlord owns. I forgot how many apartments, so many people paying so much money per month rent, it is his duty to keep it in proper repair.

Referring to plaintiff's visit to the defendant Alice Maddox, counsel said:



Mrs. Landlord, whatever her name is, she [plaintiff] asked for some money for the doctor, she refused her. If she had given the money for the doctor the attorneys possible---she wouldn't have come to an attorney, but she wouldn't do that, yet they have two lawyers and a court reporter on a hearing for two days here.

There was an objection to this, and the court for some unaccountable reason said: "I still don't think counsel has gone beyond proper argument." Referring to defendant Elijah Maddox, counsel said:

I can't see how you could possibly give him a pass on something like this. If you do, I don't know what will happen tomorrow or the next day.

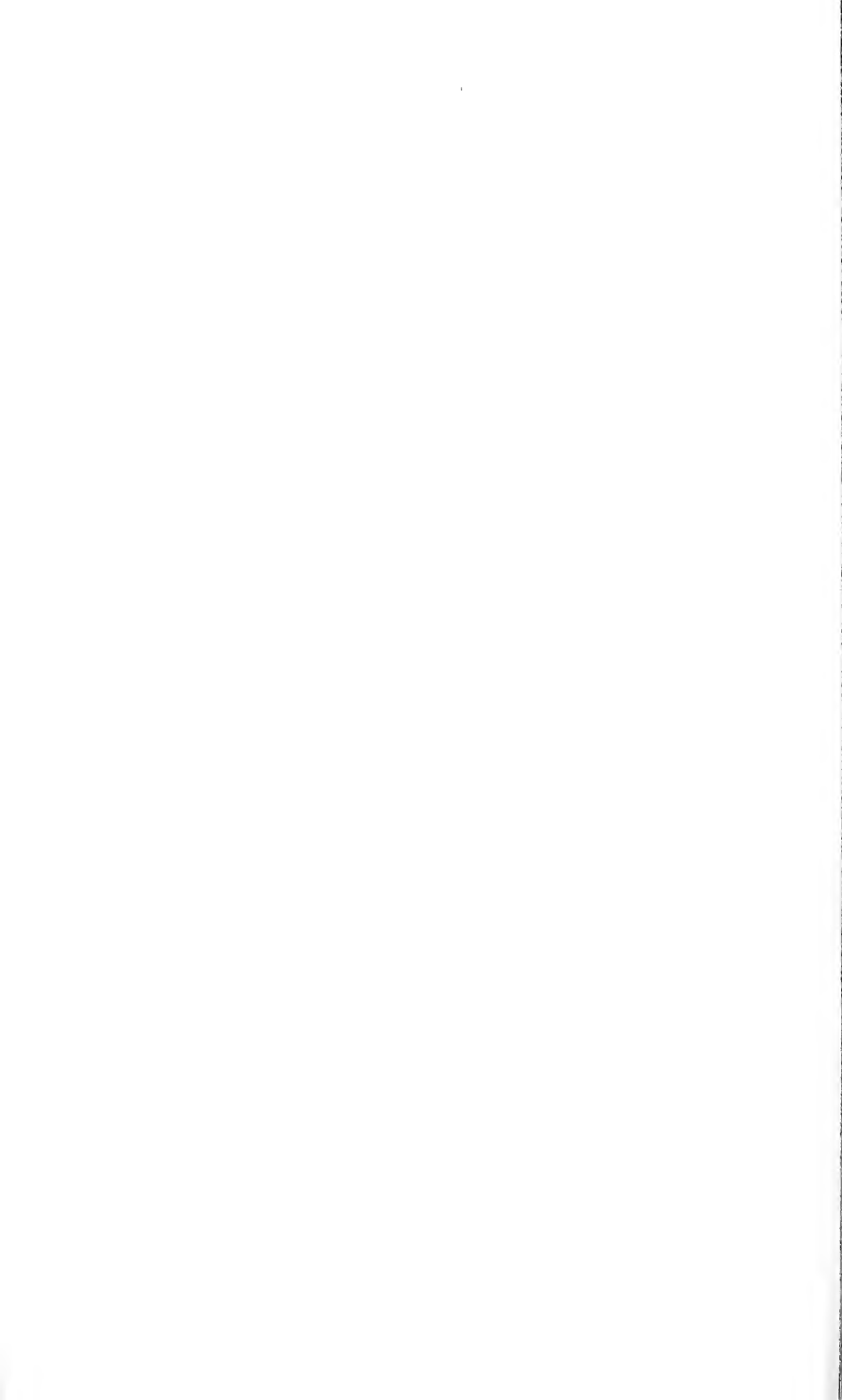
Objection to this was also overruled. Counsel continued:

It does matter, because other people are living in that building....There should be a railing on that side [indicating] but I bet you after this case there will be...

Counsel objected to that remark, and the court overruled the objection, saying: "His argument is still proper, logical, legal and a fit one." Thereupon counsel said: "Thank you, Judge," and then to the jury: "That is the reason the judge sustains me." Again, counsel argued:

You are giving this money [evidently referring to a prospective verdict] to this poor woman, not to me. It doesn't make any difference to us. We work on a percentage basis. In other words, she doesn't pay us. We take our chance. That is the reason we had no doctor come in here. They want a hundred bucks or more and we are not going to pay that....She [meaning plaintiff] doesn't have that kind of money.

They have fires, people get killed. If it wasn't for the jury system, I don't know what would happen in cases of this type.



It is no crime to have two attorneys, but I think it is a crime what happened here or what could happen here if this place isn't properly taken care of.

Then counsel made an analogy to Marshall Field & Company and said that:

[if] the elevator breaks down and somebody gets hurt. They are responsible....So, if Marshall Field has to pay, he is no different, the law doesn't make any difference.

As a matter of fact, we made the law and the law is made to protect these poor innocent Negroes who have to live in this land. There is no reason why this landlord should get fat on the profits and not take care of this building and to see that nobody gets hurt.

Counsel again made an objection, and the court said: "I still don't think he has gone beyond the bounds of legitimate argument." It is incredible that such argument should have been permitted. Courts must on their own volition stop that kind of appeal to juries. McWilliams v. Sentinel Pub. Co., 339 Ill. App. 83, 104-105, 89 N.E.2d 266 (1949).

Counsel for plaintiff said that if they had had a doctor, the case would have been worth more money "when he tells you what he found, the bleeding and the suffering," thus commenting upon evidence not introduced. "The defendant is entitled to a fair trial, free from prejudicial conduct of counsel, who in an argument undertakes to supply facts, or an inference favorable to the plaintiff not based upon any evidence in the record." Wellner v. New York Life Ins. Co., 331 Ill. App. 360, 73 N.E.2d 156 (1947).





The judgment is reversed and the cause is remanded with directions to grant a new trial and for such further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed and cause  
remanded with directions.

Dempsey, P. J., and McCormick, J., concur.

Abstract only.



47818

|                    |   |                            |
|--------------------|---|----------------------------|
| HELEN KOCLANES,    | ) |                            |
|                    | ) |                            |
| Appellee,          | ) | APPEAL FROM CIRCUIT COURT, |
|                    | ) |                            |
| v.                 | ) | COOK COUNTY.               |
|                    | ) |                            |
| PETER E. KOCLANES, | ) |                            |
|                    | ) |                            |
| Appellant.         | ) |                            |

MR. JUSTICE SCHWARTZ DELIVERED THE  
OPINION OF THE COURT.

This is an appeal from an order committing defendant for contempt for failure to pay temporary alimony in the sum of \$550.

Defendant contends that he is unable to pay and that where a person is unable to comply, without fault on his part, he cannot be found guilty of contempt. The abstract reveals the following testimony given by defendant on the hearing before the court:

Q. Did you have \$10,000 on deposit in your own name in First Federal Savings & Loan Association of Forest Park and River Forest?

A. My mother's.

Q. Which you drew out a week after this suit was filed?

A. On the orders of my mother.

Q. Whose name was that account in?

A. My name.

. . . . .

Q. You also had an account in the West Irving State Bank, of \$4,500.00 at the time this suit was filed and you withdrew that money about a week after the suit was filed, is that correct?



A. On the order of my mother.

Q. But that was in your name, is that right?

A. Yes, sir.

Q. And you also had an account in the Oak Park Federal Savings & Loan Association in the sum of \$10,000.00 and you withdrew that on November 21, approximately a week after the suit was filed, is that correct?

A. My mother ordered me to.

Q. You also had \$5,000.00 in your name in the Apollo Savings & Loan Association which you withdrew November 21, about a week after the suit was filed?

A. On the order of my mother.

Q. It was in your name and you withdrew it?

A. Yes, sir.

Q. You also had \$10,000.00 in the St. Paul Federal Savings & Loan Association which you likewise drew out on November 21, a week after suit was filed?

A. My mother ordered me to and I did.

Q. These were in your name?

A. Yes.

There is nothing on the face of the account to indicate it is anybody else's but my own. ... My brother and I bought a building as partners on Belmont between Oak Park and Newcastle. Title is held in trust with the Central National Bank. My brother and I are joint beneficiaries. We paid \$245,000. Approximately ninety some odd thousand dollars in cash. There is a balance of \$151,000.00 mortgage on which we were paying approximately \$1600.00 a month, part of which is applied on principal and part on interest and taxes. There are eight stores with about seventy feet parking on the side.



....  
My brother Charles and I have a joint account in the Bell Savings & Loan Association. There is a \$10,000.00 balance in there which belongs to my mother. Charles and I are keeping it for my mother. That is my mother's money. My brother and I have an account in the Oak Park Bank in which the rents go in from the building. We have about \$400.00 in that account, tied up since November. I operate an insurance and real estate business. Commissions were five hundred and some dollars for the whole year. I reported in my income tax last year approximately fifteen hundred dollars in interest on the accounts that belong to my mother. I have not filed my 1958 return. My auditor got an extension, but I have the information return on the partnership [handing document to court].

The court: He testified he got \$3750.00 income and another five hundred.

Mr. Goodman: Up to last year. He has not had this year's.

It is obvious that the trial judge used ordinary common sense in arriving at a sound conclusion, and that defendant has adequate resources to raise \$550.00. //

Judgment affirmed.

Dempsey, P. J., and McCormick, J., concur.

Abstract only.





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT - FIRST DIVISION

October Term, 1959

PAUL V. WUNDER

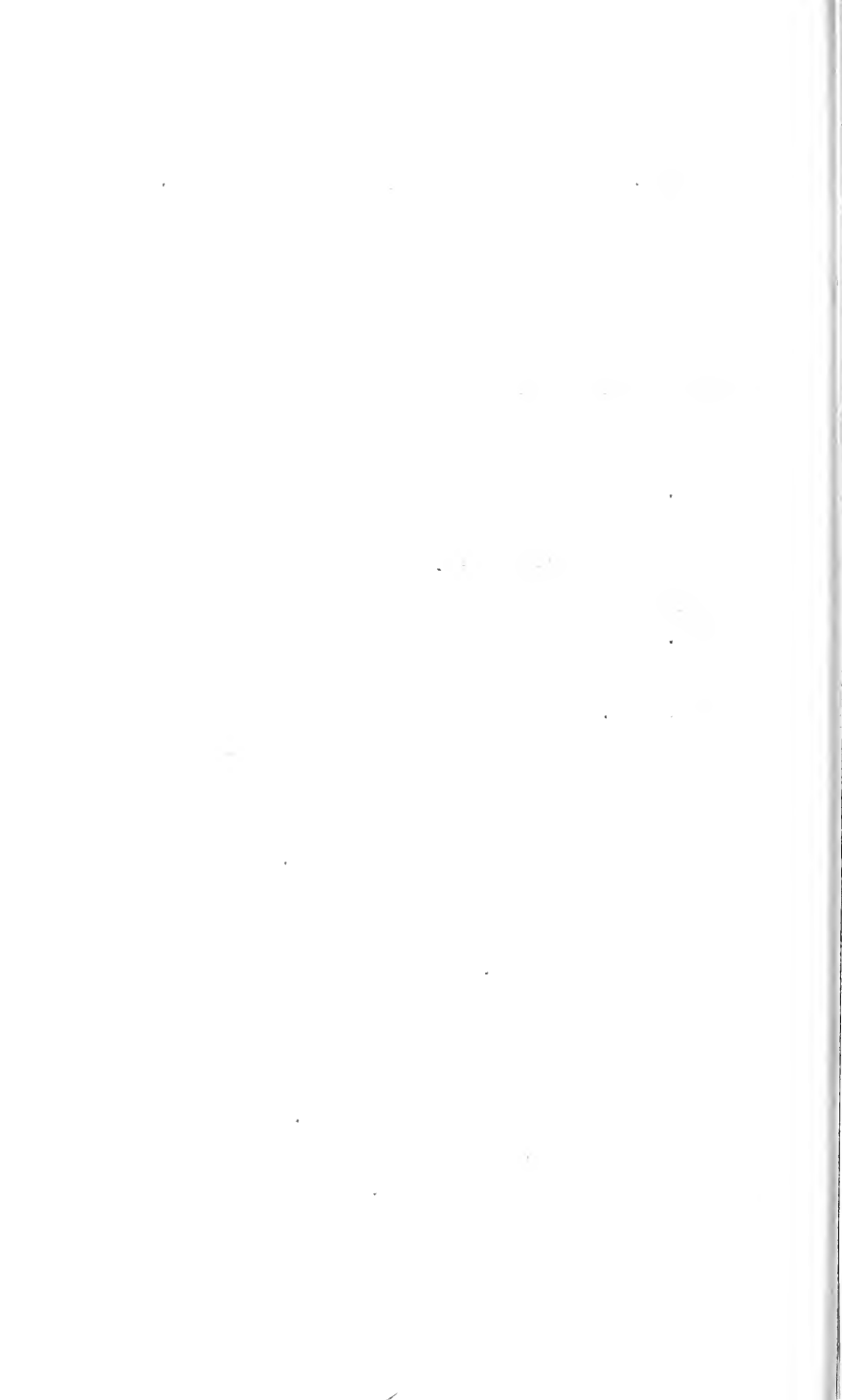
CECILE VAN GRONIGEN,  
Plaintiff-Appellant,  
vs.  
RICHARD VAN GRONIGEN,  
Defendant-Appellee.

Appeal from the  
Circuit court of  
Kankakee County

DOVE, J.

The parties to this proceeding were married on April 2, 1949. Both had been previously married and have adult children but no children by this marriage. At the time of their marriage plaintiff was head housekeeper at the Kankakee State Hospital and defendant was a carpenter and building contractor living in Kankakee. Following their marriage the parties lived on Wilson Drive in Kankakee for a short time and then moved to a farm near Watseka where they lived for two years. They then returned to Kankakee and at the time of their separation on June 2, 1958 were living in a modern one story, four room brick home with garage and basement which defendant had constructed and into which they had moved on May 19, 1955.

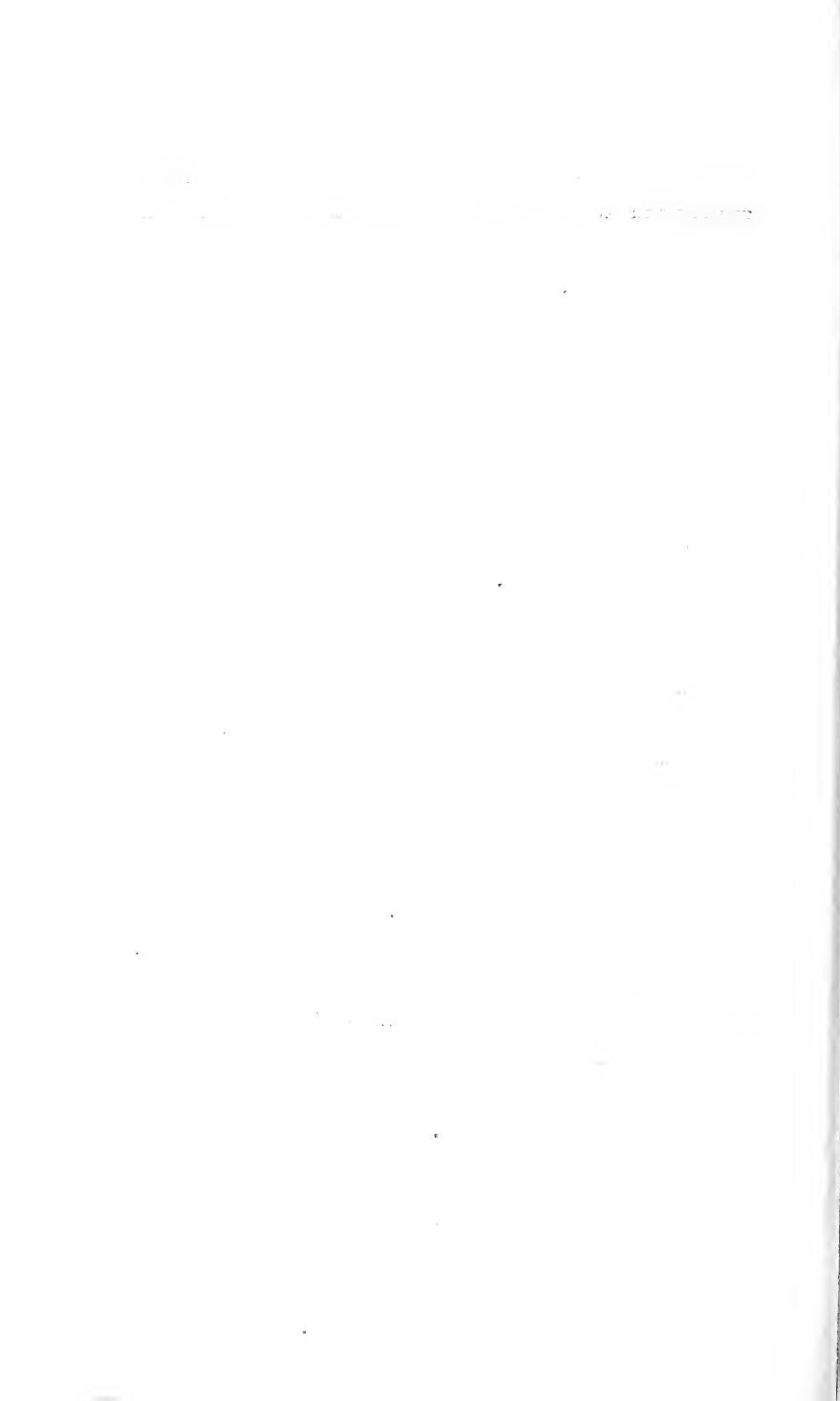
On July 18, 1958 plaintiff filed the instant complaint consisting of two counts. Count one alleged the



marriage of the parties and averred that plaintiff ~~xxxxxx~~  
~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~  
was living separate and apart from the defendant without  
fault on her part. This count alleged that defendant kept  
his tools and equipment at the home where the parties lived  
and charged that about one week prior to May 19, 1958  
defendant began moving his tools and equipment from their  
home and without informing plaintiff of his intentions left  
their home and remained away until May 31, 1958 at which  
time he the defendant, came back and remained at home until  
June 2, 1958 when he again left and had never returned to  
live with the plaintiff.

The second count contained the same allegations  
as the first count and in addition alleged that before and  
after defendant left home he had been "keeping company with  
a woman of adult years other than the plaintiff". Both  
counts averred that plaintiff had always been a good and  
dutiful wife and each count prayed for a decree awarding  
plaintiff possession of the home in which the parties had  
been living prior to their separation and for an order  
granting her separate maintenance.

The defendant filed an answer and counterclaim.  
By his answer he admitted the marriage but denied that  
plaintiff had been a dutiful wife. He admitted he left  
home on June 2, 1958 but averred that it was because of  
plaintiff's cruelty, threats and other inhuman treatment  
inflicted on him by plaintiff. By his answer defendant stated  
that he returned home subsequent to June 2, 1958 but plaintiff

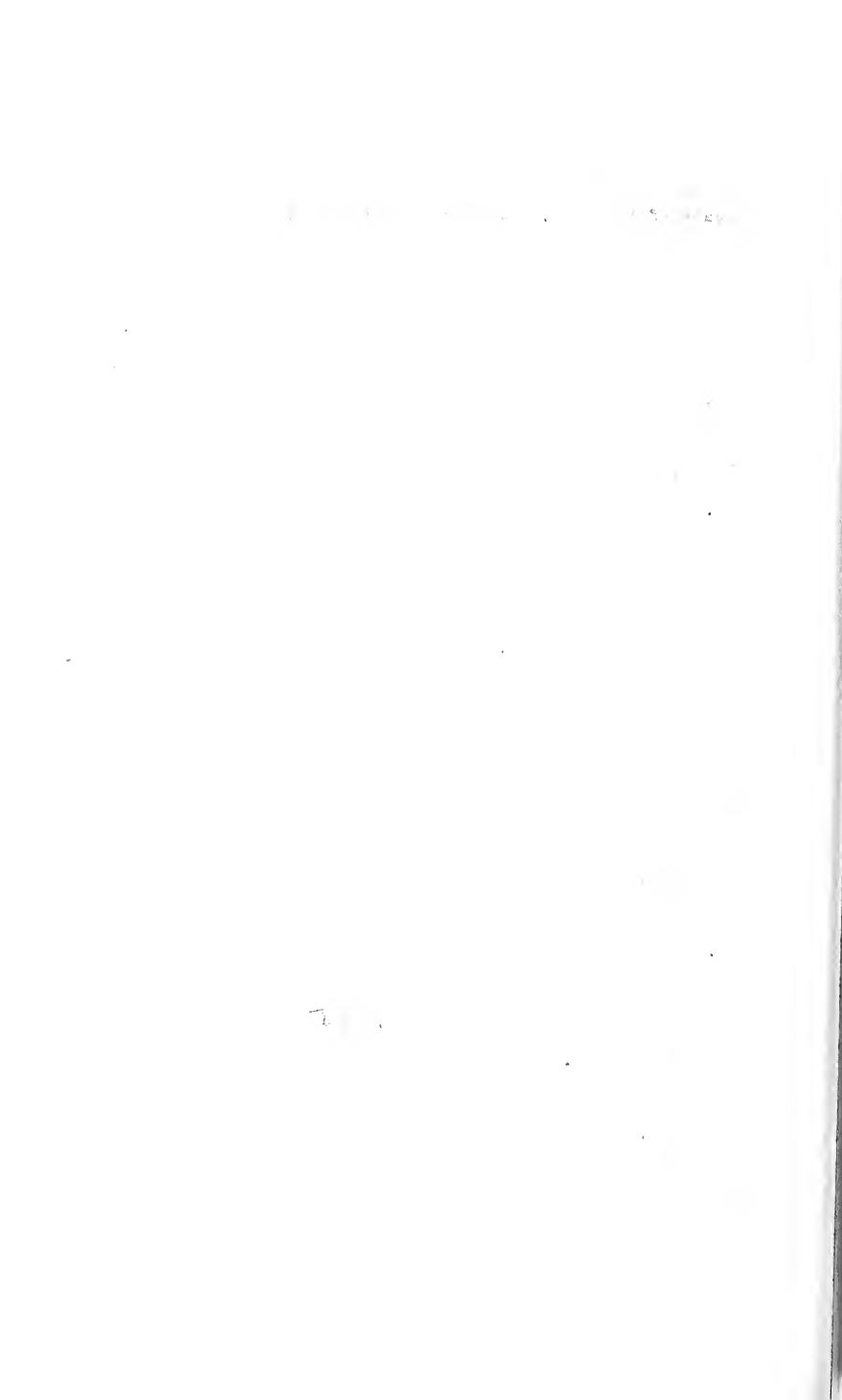


struck him a severe blow on the back of his neck and threatened his life. He denied that he, at any time, kept company with any woman other than his wife and averred that his living separate and apart from plaintiff was through the fault of the plaintiff and not the fault of the defendant.

With his answer defendant filed, on September 2, 1958, a counterclaim charging his wife with extreme and repeated cruelty on numerous occasions and particularly on July 15, 1956, April 6, 1958, June 2, 1958 and July 19, 1958. The counterclaim averred that counterdefendant drove counterplaintiff from his home on June 2, 1958 and charged that since then she had hounded, degraded, followed, trailed and pursued counterclaimant on the public streets of Kankakee and on the highways of Kankakee and Iroquois counties. The prayer of the counterclaim was for divorce and for an order restoring the premises formerly occupied by the parties to the defendant and for an injunction restraining counterdefendant from thereafter coming upon those premises.

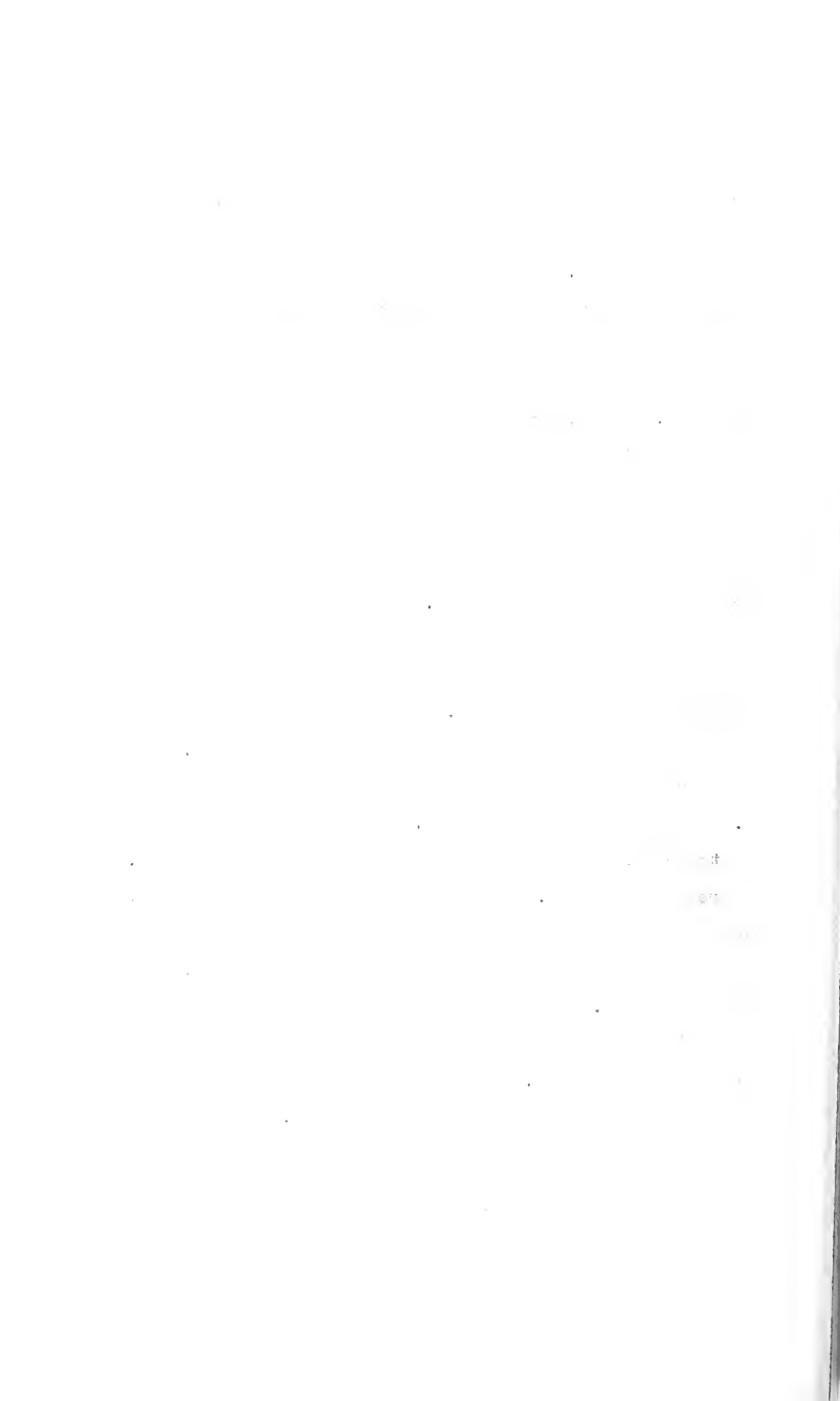
The reply of the counterdefendant denied all allegations of cruelty, denied that plaintiff ever drove her husband from their home and denied all charges of improper conduct on her part. The issues made by the pleadings were submitted to the court for determination resulting in a decree dismissing both the complaint and the counterclaim. ~~and~~ To reverse that decree plaintiff appeals.

Upon the hearing the plaintiff testified she weighed 165 pounds, was 5 feet 5 inches tall and 50 years of age; that defendant was a good husband, treated her alright, went to Church and Sunday School didn't have "any habits", was



industrious and hard working and always provided a good living and until a short time prior to February 1, 1958 he always came home at nights and if he was going to be late he would call her. She further testified that about a year before the hearing the defendant "started running around" and altho she continued to fix his lunch he wouldn't come home for supper; that after February 1, 1958 he would come in at ten, eleven, or twelve o'clock at night sometimes as late as two o'clock in the morning; that when he first began to stay away during the supper hour he would say, "I was figuring a job" or "I was looking for work"; that he would be absent from supper three or four nights a week and on two occasions stayed out all night.

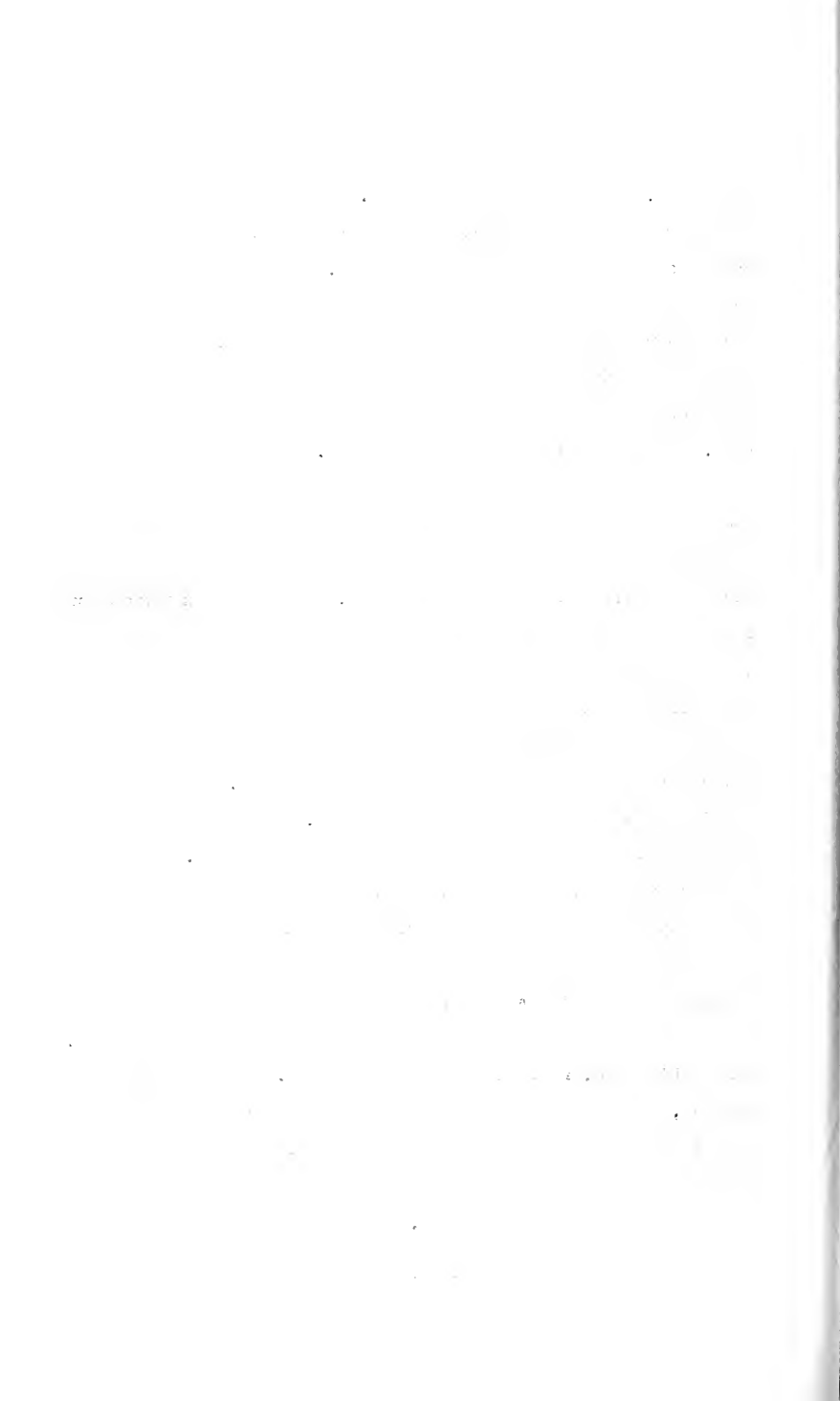
She further testified that her husband would not tell her in advance when he was going and would not tell her afterwards where he had been. As abstracted by her counsel she further testified: "On May 18, 1958 he left home. He had some financial worries and he worried about bills coming in. We both worried about them. I tried to encourage him not to worry. On May 19th I last saw him about 9 o'clock. We were there at home. We both left home at the same time. I came to town to get contracts fixed for a home he had sold and he started to town to get material to build a garage. That's what he told me. He didn't tell me he wasn't coming back but he didn't come back until the 2nd day of June. He left no word when he departed. When he came back he wouldn't tell me where he had been. That was Saturday night. Sunday night we had dinner and he was going to get his clothes and bring them



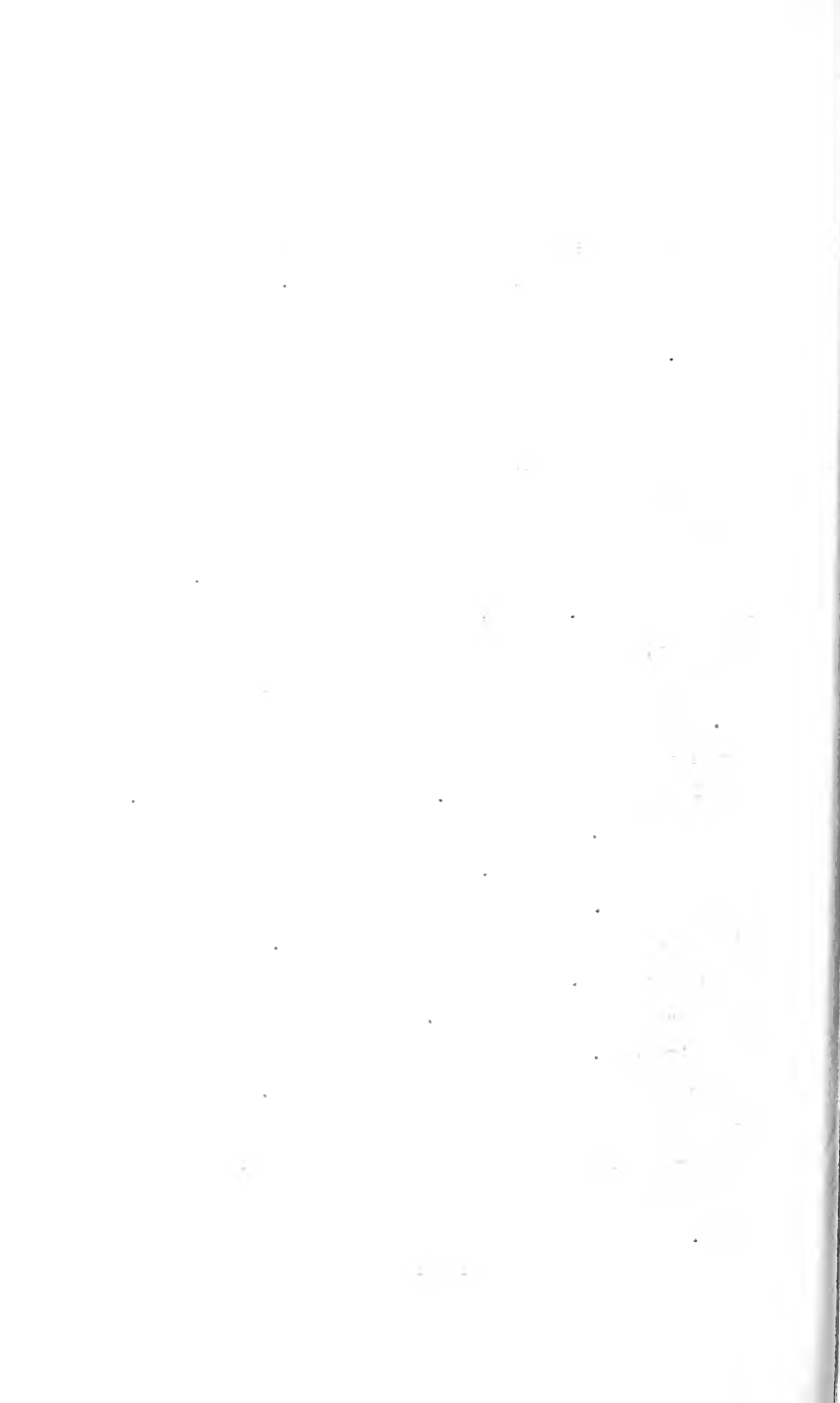


back home. He left again on Monday. He has been back a number of times but never to stay overnight. He never came back after June 2 to live with me. I never gave defendant any cause to leave home that I know of. I always did my own housekeeping and kept the house clean. I did the washing and cooking and ordinary chores of a housewife and he never complained of my housekeeping or my conduct as a wife. I never swore at him in my life".

Plaintiff further testified that the first time she saw defendant with Ruth Johnson was about one o'clock in the afternoon during the very last of June or the first part of July, 1958; that she saw Mrs. Johnson and <sup>the defendant</sup> ~~her husband~~ come out of the Johnson home in Watseka and observed them as they drove away in the car of John Stogger; that they were gone about thirty minutes and upon their return her husband got out of the Stogger car, "they kissed good bye" and he drove away and she (the plaintiff) followed him. She also testified that she saw defendant and Mrs. Johnson together in Momence, walking down the street, "hand in hand". Upon another occasion, October 22, 1958, she saw Ruth Johnson in her husband's car in a parking lot in Kankakee; that she went to the car, opened the door and told Ruth to get out of her husbands car; that instead of complying with the request Ruth hit plaintiff with her purse and plaintiff grabbed Ruth's coat. About this time, according to the plaintiff, the defendant arrived, gave Ruth the keys to the car and she left, leaving plaintiff and defendant at the parking lot. Upon another occasion, on December 1958 plaintiff again saw her husband and Ruth driving toward Watseka.

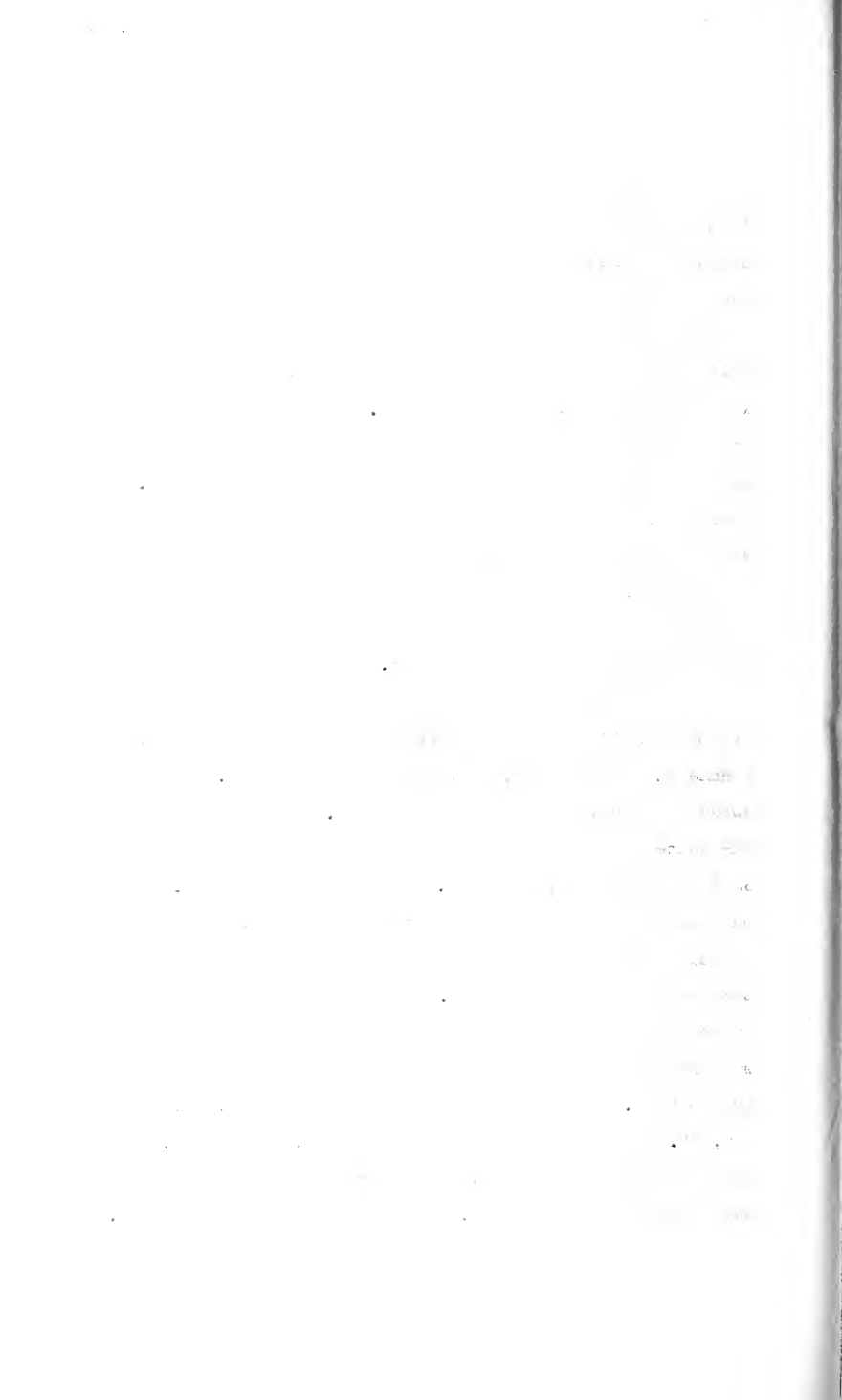


Defendant testified that in April 1958 he sprained his ankle and was taken to the Iroquois hospital where he remained a short time. He then entered St. Mary's Hospital and was there a couple of weeks, returning to his home on May 7th. Between May 7th and May 19th the relations between the parties were unpleasant and he left and went to his sister's home in Mokence where he remained until May 31st when he returned home. At that time, according to the defendant, his wife, informed him she had sold the property referred to in the record as the "Kent" house and requested him to sign a contract in connection with its sale. He refused to do so. "Then," according to the abstract of his testimony, "she got mad at me and called me names and so I couldn't stand it and after that I left home. That was June 2nd. Between April 1958 and June 2, 1958 my wife and I couldn't get along because of all the bills we had and there was always arguments about it and worry. I earned no money in June. I was under Dr. Buch's care and he was treating me. I saw my wife in a gas station. She followed me at least two hours in a car. I couldn't get rid of her. She would drive alongside of me and talk to me and curse me. She wrote a lot of letters to me. On October 17th I went to the basement of our home to pick up the truck. The battery was down and it wouldn't start. As I was carrying some tools to the truck she hit me in the back of the neck with her fist. She cursed me and picked up a club and was going to hit me. She hit me with a bed room shoe one time but I don't know when. She threatened to shoot me in August, 1958 and has threatened to slander my name".



Defendant's version of the parking lot incident was that on account of heart trouble, he could not drive his car so Ruth Johnson had driven him to the office of his doctor and she remained in the car while he went to a drug store; that upon his return to the car he observed plaintiff trying to pull Ruth out of the car and was hitting her with her purse and the car keys fell to the floor. He further testified that in April 1958 he was in bed asleep and his wife came to the bed and without provocation hit him with a bedroom shoe. Her version of this incident was that defendant on April 12, 1958 arrived home at two o'clock in the morning; that he smelled of liquor and she inquired where he had been and instead of answering her inquiry he pushed her backwards and she threw her houseshoe and hit him with it.

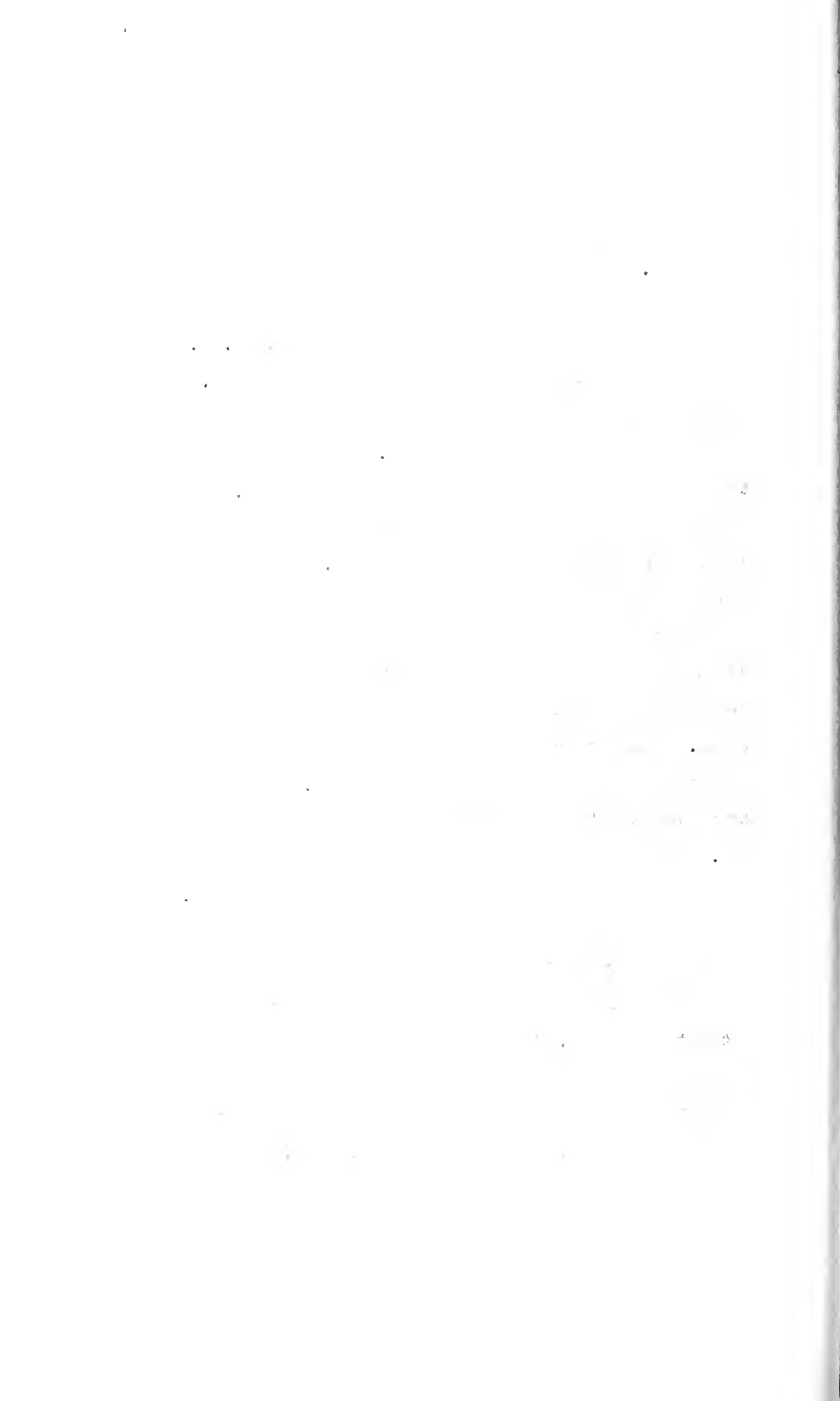
The record discloses that at the time of the marriage of these parties defendant owned a house in South Dakota, and a home on Wilson Drive, Kankakee which he rented. He also owned some unimproved lots in Kankakee. After their marriage the house in South Dakota was sold and a mortgage was placed on the Wilson Drive property. A farm near Watseka was purchased and plaintiff constructed two houses, one on Ark Drive, which was sold under contract and is referred to in the record as the Kent house. The other house is the Wilson Drive property where plaintiff resided at the time this proceeding was instituted and where she was still living at the time of the hearing. This property is worth between \$20,000.00 and \$25,000.00 and is encumbered by a \$11,000.00 mortgage. The farm was sold in October 1958 and from the proceeds of the sale plaintiff received \$7,000.00 and defendant a like sum.



The rental properties were sold in November 1958 in a partition proceeding and one of them was purchased by the plaintiff. The evidence further discloses that plaintiff in addition to her title and interest in the real estate mentioned also owns two bonds each worth \$1,000.00.

We have read the evidence as abstracted. Defendant testified that plaintiff struck him either with her fist or shoe on three different occasions. Plaintiff admitted throwing a shoe at defendant on April 12, 1958, more than a month before defendant first left home but she denies the other acts testified to by her husband. She admitted that upon one occasion she told her husband that she would shoot him but the evidence is that upon this occasion although she was angry she had no means to carry out her threat and the evidence indicates she had no intention of doing any such thing. Upon other occasions defendant testified his wife cursed him but this the plaintiff denies. It might be noted that plaintiff's testimony <sup>to the effect</sup> that she observed defendant kissing Mrs. Johnson and heard him call her "Honey" and saw them holding hands at the Gladiola Festival was undenied.

Counsel for both parties agree that in order to entitle plaintiff to a decree awarding her separate maintenance the burden was upon her to prove that the separation was without her fault. If she materially contributed to the disruption of the marital relationship she cannot be said to be living separate and apart from her husband without her fault (Amberson v. Amberson, 349 Ill. 249). Nor can she





recover if the separation was due to the conduct of both parties. (Levy v. Levy, 388 Ill. 179). In disposing of the case the trial court stated that from the conduct of the witnesses as he observed them and from the evidence produced upon the hearing it was apparent that it had been very difficult for defendant to live with the plaintiff and that he, the trial court, was not convinced that the parties were living separate and apart without fault on the part of the plaintiff. While we concur in this conclusion, we might add that appellee is not entirely free from fault and a proper regard for the feelings of his wife should have precluded such conduct on the part of appellee as this record discloses. We are unable to say, however, that the evidence found in this record clearly preponderates against the findings of the trial court and we are unable to conclude that the trial court should have reached an opposite conclusion.

At the conclusion of appellee's brief it is stated that the trial court erred in refusing to grant appellee a divorce in accordance with the prayer of the counterclaim. The correctness of the dismissal of the counterclaim is not before us. No cross appeal was prosecuted. (Ill. Rev. St. 1957, Chap. 110, sec. 101.35 (1)).

The decree appealed from is affirmed.

Decree affirmed.

McNEAL, P.J. CONCURS.

SPIVEY, J. CONCURS.

McMurry, J. I. 1908  
1908, 1909, 1910

47838

PEOPLE OF THE STATE OF ILLINOIS, )

Defendant in Error, )

v. )

JEAN BURROWS, )

Plaintiff in Error. )

ERROR TO THE

MUNICIPAL COURT

CITY OF CHICAGO

23 I.A. 21 C18

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to review defendant's conviction for possessing papers used in gambling. He was fined \$200.00 and costs.

The only question presented is whether the information is sufficient.

The pertinent part of the information charges "that Jean Burrows . . . Did then & there not being a Police Officer, unlawfully & wilfully, have in his or her possession, . . . papers. . . which contained writings. . . used in . . . a game called Policy. . . ." The information is drawn under the third of several disjunctive provisions of the second section of "An Act for the Prevention of Policy-Playing", ch. 38, sec. 413, Ill. Rev. Stat. (1955). That provision is: "A person. . . who shall have in his possession, knowingly, any writing . . . representing. . . 'policy'. . . shall, upon conviction . . . be fined. . . ."

Since intent, i.e., "knowingly", is an element of the offense, it was necessary to be alleged. People v. Edge, 406 Ill. 490; People v. Harris, 394 Ill. 325. The word "unlawfully"



was substituted in the indictment for "knowingly" in People v. Edge, 406 Ill. 490, cited by defendant, and the allegation was held insufficient since "unlawfully" connotes merely an act contrary to law. That case misses the point here, however, where "unlawfully and wilfully" are the substitutes.

"[K]nowingly implies that the act was performed consciously, intelligently, and with actual knowledge of the facts," said the court in People v. Edge, citing Webster's New International Dictionary (2d ed. 1934); Black's Law Dictionary (3d ed. 1933); Bouvier's Law Dictionary (Rawle's 3d rev. 1914); and Words and Phrases (perm ed.). Webster defines "willful" as "self-determined; voluntary; intentional; as, willful murder". (Emphasis added.) In Black's Law Dictionary, "wilfully" is said to have the same meaning as "knowingly". And our Supreme Court holds that "'wilfully' is synonymous with 'knowingly'." Kennerly v. Shell Oil Co., 13 Ill. 2d 431, 439.

We think the term "wilfully" implies a prior intellectual choice and that "wilfully" in the information sufficiently charged "knowingly". The trial court properly denied the motion in arrest of judgment. The judgment is affirmed.

AFFIRMED.

MURPHY, P.J. AND LEWE, J., CONCUR.

ABSTRACT ONLY.



47836

LILLIAN N. GOLDSTINE,

Appellee,

v.

LEE M. GOLDSTINE,

Appellant.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT,

COOK COUNTY.

2d  
23 I.A. 367

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from a temporary injunction order entered in a separate maintenance suit, restraining the defendant husband from entering the apartment formerly occupied by both parties and from transferring his assets.

The following facts are admitted by the pleadings. Plaintiff and defendant were married on June 1, 1938, and lived together as husband and wife, with their two unmarried daughters, sixteen and nineteen years of age, on a pretentious scale, in an 11-room air conditioned, splendidly furnished apartment at 5490 South Shore Drive, Chicago, Illinois. Defendant also maintained residences in Wisconsin and Japan, a private airplane, an office at Chicago, and enjoyed a substantial income. He is required to spend a great deal of time in Japan and to travel extensively on the affairs of two corporations controlled by him. Plaintiff separated from defendant on February 20, 1959, and, on the same day, filed her suit for separate maintenance. With leave of court, she filed her complaint on February 27, 1959, and, on the same day, defendant filed his answer.





Under an agreement dated February 27, 1959, defendant was to move from their South Shore Drive apartment, and plaintiff was to be permitted to occupy the apartment until June 1, 1959, and thereafter "until the Husband shall have given the Wife five (5) days' notice in writing of his intention to reoccupy said apartment and shall have returned to Chicago."

On May 15, 1959, plaintiff filed a petition, which included the agreement, alleging defendant's breach of the agreement, and praying for injunctive relief in conformity with her complaint. Defendant answered, denying the breach.

On June 17, 1959, the cause was referred to a master in chancery for a hearing on the allowance of alimony and the right of possession to the South Shore Drive apartment. The order of reference also restrained defendant, until September 15, 1959, from entering the apartment and from transferring his assets. A similar order had been entered on May 27, 1959, and was limited to June 16, 1959.

The questions are whether the complaint states a cause of action for separate maintenance and, if so, did the court abuse its discretion in granting temporary injunctive relief.

The complaint alleges defendant expressed dissatisfaction with the marriage and her presence; that sometime previously he had told her he was making preparations to put her aside and in two years would insist on a divorce; that he systematically berated, scorned and verbally abused her, threatened to drastically reduce her financial expenditures so that she could not maintain



herself in the society in which she moved; that early in 1959 he told her he was finally ready, in accordance with his plans, to get rid of her, and she had better hire lawyers to get a divorce; that he would no longer provide her with the necessities of her existence, which would force her to take action, and he was ready for her when she did; that on February 17, 1959, after returning from Tokyo, Japan, he wrote her a letter that he had determined not to furnish her with any money or to pay for the expenses of herself and the children; and that she was to use her own funds and, on a proper showing, he might repay her for some of the expenditures. The complaint also alleged he associated with unsavory characters, used the South Shore Drive apartment as a transient hotel, and actually did not live there; that he had large amounts of cash and property secreted, and in view of his statement that he was preparing for her when she took action as he demanded, she feared he would transfer and assign his assets so as to make them unavailable for the proper support of plaintiff and her children; and that he was planning to return to Tokyo, Japan, to live, and only maintained his presence in their apartment to harass and spite her and to make her life more difficult. Defendant's answer denies most of these charges and makes no charge of any misconduct by plaintiff.

Considering the complaint in the manner the law requires (Curran v. Harris Trust & Savings Bank, 348 Ill. App. 210 (1952)), we believe the complaint, if proved, would entitle plaintiff to a decree for separate maintenance. The acts of



misconduct set forth in the complaint, considered collectively, portray a persistent, unjustifiable and wrongful course of conduct toward plaintiff, from which it can be concluded, necessarily and inevitably rendered her life miserable and living as his wife unendurable. The inference may be justly drawn that he intended to produce that result. (Abraham v. Abraham, 403 Ill. 312, 313 (1949).) The facts alleged show more than mere incompatibility, slight moral obliquities, occasional exhibitions of passion or trivial difficulties, which will not justify separation.

Hellrung v. Hellrung, 321 Ill. App. 333 (1943).

Defendant admits he is frequently required to be away from home, and that he travels extensively, and his business necessitates his being in Japan "a great part of his time." In February, defendant voluntarily vacated the apartment and turned it over to plaintiff and the children, because he was returning to Japan for a period of time. Apparently, this was to suit his own convenience. Defendant is a man of wealth, spending considerable time away from home, and economically well able to obtain other suitable residential quarters for such periods of time as he may be in Chicago. We see no error in temporarily restraining him from entering the family apartment.

We believe the temporary restraint of the transfer of his assets was also justified. The agreement between them provided that he would make available to plaintiff's attorneys and agents such of his records as may be reasonably necessary for a determination of his actual income and assets. The record shows



a dispute as to his records, which resulted in the court referring the matter to a master in chancery for hearing. Defendant's admitted business activities in foreign jurisdictions made it reasonable for the chancellor to assume irreparable damage might occur to plaintiff's rights, unless defendant was temporarily restrained from transferring his assets. Transfers in the ordinary course of business were specifically excluded from the restraint order. As alleged in the complaint, without the restraining order, plaintiff and her children might be left without support, in case defendant chose to transfer all of his property to the foreign jurisdictions frequented by him.

We see no abuse of discretion in the entry of the orders appealed from, which were entered after the cause had been pending before the chancellor for a period of four months, and in which he had entered other orders from time to time. We conclude the complaint stated adequate grounds for ultimate relief in separate maintenance and contained sufficient allegations to warrant the entry of the temporary injunction orders of June 17, 1959, which we hereby affirm.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

ABSTRACT ONLY.





22

47782

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff - Appellee,

v.

RONALD TALBERT,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222.1.23881

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a conviction of petit larceny in a trial by a court without a jury. He was sentenced to six months in the House of Correction and fined \$100.

A private detective for Spiegel, Inc., a Chicago department store, testified that he arrested defendant the afternoon of September 8, 1958, about a block from the Spiegel store after defendant threw "his coat containing three sweaters at me and took off running"; that the sweaters were not in a bag, had Spiegel's price tags on them, and were the property of Spiegel; and that in Spiegel's "protective" office defendant "admitted having stolen" the sweaters.

Defendant testified he did not steal the sweaters and "was walking down the street...[when] someone started hollering, 'Stop that man, stop that thief.' Naturally I just started running." He further testified that he had the sweaters in his hand and they "fell...in the chase". He denied the admission of theft but admitted being in the store, and said a friend of his named Roy - "the only thing I knew him by" - whom he "just ran into", had handed the sweaters to him and asked him to hold them until the friend's return. He said his impression was that Roy had bought them.



The court stated, after proof of possession, admission of stealing, identification of sweaters, throwing off the sweaters, and flight, "There is no question in my mind that he is guilty." After a study of the transcript, we can not say that "there is any reasonable or well-founded doubt" of defendant's guilt. People v. Miller, 13 Ill.2d 84, 113. If the court accepted the State's evidence as true, as it could reasonably have done, there is not here the "mere suspicion" upon which the court freed co-defendant Hull in People v. Mulford, 385 Ill. 48, 54.

There was no objection made to the admission of defendant's statement of guilt, People v. Hurry, 385 Ill. 486, 489, or motion to strike it on the ground that it was involuntary, People v. Fox, 319 Ill. 606, 616, so the court did not err in admitting the statement and relying on it. Defendant's flight was a circumstance that could be considered, People v. Gibson, 385 Ill. 371. And it was conceded at trial that possession of the stolen sweaters gave rise to a presumption of guilt.

There is no merit in the contention that the State should have procured "important witnesses". It chose to rely on what evidence it produced, and we have found that the trial court did not err in deciding that there was no reasonable doubt of defendant's guilt. There is no merit either in the claim that defendant was deprived of a fair trial under the court's "dual role of prosecutor and judge". The trial court's statements complained of were in response either to defendant's motion or in support of its determination of guilt.



Finally we see no error in the trial court's finding that there was enough evidence to establish the corpus delicti. The court denied a motion to dismiss the charge against defendant on the ground that the corpus delicti had not been established, stating, "There is enough Corpus Delicti,...the sweaters, price tags,... [and] his own admission...." The test is whether "the whole evidence" proves the crime and that defendant committed it. People v. Miller, 13 Ill.2d 84,105. That test was applied by the trial court and no error was made in its application.

We can not say that the trial judge should have accepted the defendant's version rather than that of the Spiegel detective, or that the judgment rests "on doubtful, improbable or unsatisfactory evidence, or clearly insufficient evidence". People v. West, 15 Ill.2d 171, 176.

The judgment is affirmed.

AFFIRMED.

MURPHY, P.J. AND LEWE, J. CONCUR.

ABSTRACT ONLY.

873

a restaurant, where the plaintiff became ill, so ill that she was unconscious or semi-conscious. The defendant and a male friend took the plaintiff ~~and defendant~~ back to the hotel apartment so that the plaintiff could recover. The defendant's friend was with the plaintiff and defendant most of the time, but as the time for the play arrived, he excused himself and left the plaintiff and defendant alone in the hotel apartment. When the plaintiff awoke, she was lying on her back on a bed in the apartment. She was clad in a strapless bra and a half slip. She states that when she realized her state of undress, she started to cry, but the defendant who was in the room with her, ~~was said to have~~ stated that he hadn't done anything to her that she didn't want him to. She stated that there was nothing unusual about her person, except that her feet were dirty. She noticed nothing on the bed or her body and had no idea that the defendant had had intercourse with her. She replaced her clothes, freshened herself in the washroom and then the two of them returned to the party at the theatre. It was estimated by the defendant that they had been alone in the apartment for five minutes.

It is uncontradicted that some time subsequent, the plaintiff told the defendant she was pregnant and she testified that he admitted having sexual relations with her. Both agree that he took her to Chicago to see his family doctor but that the day they went to Chicago, the doctor was not in. Defendant contends that this was in December and plaintiff says the trip was in January.

Plaintiff's mother testified that the defendant stated, in response to a question as to why he did this to the plaintiff, that he did not know, "drunk and I wanted to, I guess". Defendant denied the act, and denies the admissions testified to by the plaintiff and her mother.



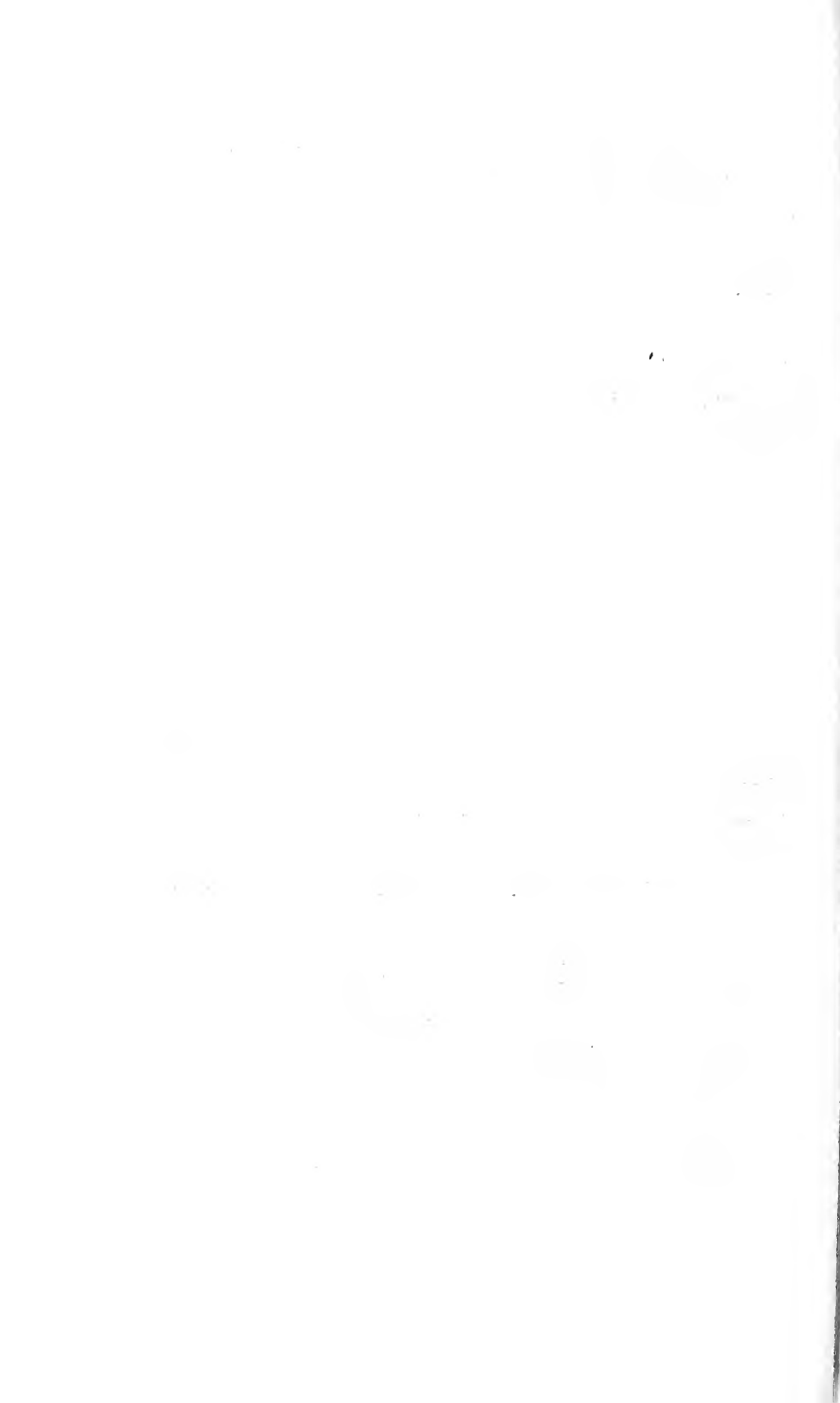


Eight months after the alleged occurrence, on July 23, 1957, the plaintiff gave birth to a female child. She testified that the defendant was the only person she had had intercourse with and on only the one occasion. The child was a normal child.

The court has found the issues for the plaintiff, and we cannot say that there is no evidence to support the court's judgment. He possessed one tremendous advantage that we are deprived of. That is, he had an opportunity to see and evaluate the witnesses and to judge first hand their credibility from their manner and demeanor. This being so, we would not be justified in substituting our judgment for his. Viewing the evidence in its strongest light, we feel that the case for the plaintiff was weak. But whether our conclusion would have been the same as the trier of the facts, is immaterial. This court is obliged to affirm unless the result is clearly contrary to the manifest weight of the evidence or without evidentiary basis. People ex rel. White v. Underwood, 1 Ill. 2d. 260, 116 N.E. 2d. 354; Black v. Gray, 411 Ill. 503, 104 N.E. 2d. 212; Calcutt v. Gaylord, 415 Ill. 390, 114 N.E. 2d. 340.

As we said in Jorn v. Tallett, 341 Ill. App. 240, 93 N.E. 2d. 82:

"The trial judge who sees and hears witnesses is in a much superior position to find the truth than the reviewing court who has before it only the printed page. Well worth repeating in this connection is the language of the judge of the Supreme Court of Missouri in the case of Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118. 'He (Trial Court) sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears



the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant sneering tone, the heat, the calmness, the yawn, the sign, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson or the itching over-eagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.'"

We can only conclude that the judgment is not contrary to the manifest weight of the evidence and the judgment of the County Court of McHenry County must be affirmed.

Judgment affirmed.

McNeal, J. and Dove, J. Concur.

Koness, J. and Love, J. Concord.

N. FLYER & SON, INC.,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION  
OF THE COURT.

We will first give a brief outline of a rather complicated set of facts. On October 30, 1956, Harry Flyer, president of plaintiff company, and five individuals, four of whom are defendants in this action, entered into an agreement for the development, improvement and sale of certain real estate known as "Fordon Park." At some time between that date and the date of the contract here involved, October 17, 1957, plaintiff performed certain



-2-

contracting services. Then, apparently, difficulties of a financial character developed, and a new agreement was drawn. That agreement cancelled and terminated the 1956 agreement and released all parties from any claims except for certain enumerated obligations. The contract recited that \$3000 had been paid plaintiff, leaving a balance due of \$20,271.11, which claim plaintiff agreed to settle for \$18,235.75. Defendants agreed to indemnify the builder and plaintiff from claims and demands of certain contractors, their exact status not having been designated in the contract. Plaintiff was to assume and pay five other contractors or subcontractors, whose status is equally indefinite and whose claims were to have been included in the sum of \$18,235.75 which was to have been paid plaintiff by defendants. No date was specified for payment of the five claims. Defendants promised to pay plaintiff's claim within three months of the contract date and to pay plaintiff interest plus all costs and expenses, including reasonable attorneys' fees, incurred by plaintiff in endeavoring to collect that amount, should defendants default in making payment within the specified time.

Defendants on December 10, 1957, assigned their rights and obligations under the 1957 contract to one William Ruth. It is alleged in the answer that Ruth demanded that plaintiff pay the five claimants it had agreed to pay, as a condition precedent to payment of the





-3-

principal sum due on January 17, 1958, which plaintiff refused to do.

On March 5, 1958, plaintiff commenced this action founded on the 1957 agreement, demanding recovery of \$18,235.75 together with interest and attorneys' fees. On April 4, 1958, while this action was pending and before a defense was filed, Ruth and plaintiff reached an accord, and Ruth agreed to and did pay plaintiff the principal amount claimed, \$18,235.75, plus court costs and a \$3.00 filing fee it had incurred in filing its mechanic's lien. What was said about attorneys' fees and interest is in dispute, and we will hereinafter discuss that phase of the matter. Defendants answered the complaint, alleging that plaintiff had been paid the sum it demanded and alleging, further, that on the performance date of the contract and at the time plaintiff filed its action, it had failed to perform certain covenants contained in the agreement, having reference to the payment of the five claims plaintiff had agreed to pay.

Plaintiff on May 13, 1958, filed a supplement to its statement of claim, acknowledged receipt from Ruth as before stated of the principal sum sued for and paid to plaintiff after it had filed suit, but demanded payment of accrued interest and attorneys' fees. Defendants then filed their answer on December 23, 1958, called the second amended defense, averring that plaintiff had received the



-4-

principal sum of the contract from a third party in full settlement of its claim, thereby barring additional recovery. We will first consider whether this sets forth a legal defense to the supplemental claim for interest and attorneys' fees.

It is well settled that part payment by a third person in full settlement of a liquidated debt discharges in full the entire original debt. Employment Counsel, Inc. v. Szarek, 350 Ill. App. 201, 112 N.E.2d 524 (1953); Bealkowski v. Powers, 310 Ill. App. 662, 35 N.E.2d 386 (1941); Kuhn v. Kuhn, 171 Ill. App. 298 (1912); Corbin, Contracts, sec. 1285 (1951); 1 C.J.S. Accord & Satisfaction sec. 12 (1936); Restatement, Contracts, sec. 421 (1932). Ruth swore to defendants' second amended defense, alleging that his payment was intended by the parties to have been in full satisfaction of plaintiff's claim. Opposed to this averment, plaintiff's attorney testified at the hearing for determination of attorneys' fees that Ruth refused to pay interest and attorneys' fees, but referred plaintiff to defendants for payment of those items, thereby indicating that full satisfaction of plaintiff's claim was not intended by Ruth's payment. A triable issue of fact was thus created which should have been decided upon a full hearing.

Plaintiff maintains that since Ruth was already obligated to pay plaintiff by reason of the assignment, he cannot be said to stand in the position of a third



person to the transaction as contemplated by the rule. This contention cannot be sustained. Plaintiff contracted with defendants in the original transaction, and defendants' assignment to Ruth gave plaintiff a party additional to that contract from whom it could recover. Even though Ruth was paying his own obligation, his payment was one other than that bargained for by plaintiff, thereby constituting performance by a third person under the rule stated.

Defendants urge two other defenses which, in view of the fact that the case has to be tried again, we will now pass upon. They argue, first, that plaintiff failed to perform certain conditions precedent relating to the payment of the five claims and to clear recorded and unrecorded mechanics' liens filed by some of the five claimants. An exception to the rule requiring proof of performance is recognized where there are several agreements in a contract independent of each other, in which case one party may bring an action against the other for a breach without averring performance of all of his agreements, and to which an allegation of the other party's breach does not constitute a defense. Foreman State Trust & Savings Bank v. Tauber, 348 Ill. 280, 180 N.E. 827 (1932); Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1904); Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N.E. 247 (1900).

Defendants recognize this exception to the general rule, but insist that under the 1957 contract plaintiff's covenant to pay the five claims was a dependent covenant



and that payment thereof was a condition precedent to plaintiff's recovery. Plaintiff answers that it did not promise to pay the five claims, but that even if it did, that promise was an independent covenant, the nonperformance of which cannot be raised as a defense to defendants' failure to perform. There can be no doubt that the language of the contract, reading: "The following items listed in said letter have been included in the said claim of the contractor and are to be assumed and paid by it,..." clearly constitutes a promise by plaintiff to pay those items. The contract, as drawn and agreed to by plaintiff and defendants, contained several covenants agreed to be performed by each of the parties. Plaintiff's promise to pay the five claims was only part of the consideration for the entire claim, and defendants would have an adequate remedy for damages incurred as a result of plaintiff's failure to perform. The rule applicable to such a state of facts is that a covenant going only to part of the consideration given by both sides, a breach of which may be compensated in damages, may be considered as an independent covenant. Defendants may not raise plaintiff's failure to perform such a covenant as an excuse for their own breach. For breach of plaintiff's covenant, defendants must rely upon their claim for damages either by way of recoupment or in a separate action. Foreman State Trust & Savings Bank v. Tauber, supra; Rubens v. Hill, supra; Palmer v. Meriden Britannia Co., supra; Prairie





Farmer Co. v. Taylor, 69 Ill. 440 (1873).

Under the contract made by the parties, defendants unqualifiedly promised to pay plaintiff the principal sum within three months of the contract date. Plaintiff agreed to "assume" the five claims, but nowhere does the contract specify a date for the performance of that obligation. To hold that this was a dependent covenant would be to supply a date for its performance. The parties knew how to designate a performance date. There is no reason why such a date should be supplied by a court. We find therefore that these are not dependent covenants.

Defendants have filed what they call a counterclaim and setoff. It is stated therein that liens which plaintiff had agreed to discharge were not so discharged, and demand was being made on defendants for their payment. If this is correct, then defendants were entitled to a counterclaim in that amount. If on a hearing of the case it should be found that plaintiff is entitled to recover attorneys' fees and interest, then the court should allow a counterclaim against that sum for any damages suffered by defendants because of mechanics' lien claims which plaintiff had failed to discharge.

Defendants argue that the 1957 contract was one for work, labor and material and as such is subject to the Mechanic's Lien Act, Ill. Rev. Stat., ch. 82, sections 1-39 (1959). They contend that under that Act an owner cannot



rightfully pay a contractor until the contractor has first paid his subcontractor, citing section 27. Plaintiff maintains that the contract was not for work, labor and material, but was an accord and satisfaction of a previously existing contract for those items and that therefore the Act has no application. This was not a contract for the prospective improvement of real estate, and the fact that the "consideration" given for the contract was work which it had performed and materials it had supplied under a different contract does not make it so. We therefore think that the trial court properly struck defendants' second amended defense as it related to the Mechanic's Lien Act and to custom and usage defenses which would have application only to contracts for the improvement of real estate. The fact that plaintiff retained its right under the 1957 contract to enforce the mechanic's lien filed against the property in question in the event of defendants' default does not alter our conclusion that the 1957 contract was not one for the improvement of real estate.

The judgment is reversed and the cause is remanded with directions to vacate the judgment and deny the motion to strike the second amended defense insofar as it relates to the defense of accord and satisfaction, and for such other and further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed and cause  
remanded with directions.

Dempsey, P. J., and McCormick, J., concur.

*Order from  
Clerk of Court dated  
1-12-60 to  
substitute this entry  
new Page 8*



-8-

rightfully pay a contractor until the contractor has first paid his subcontractor, citing section 27. Plaintiff maintains that the contract was not for work, labor and material, but was an accord and satisfaction of a previously existing contract for those items and that therefore the Act has no application. This was not a contract for the prospective improvement of real estate, and the fact that the "consideration" given for the contract was work which it had performed and materials it had supplied under a different contract does not make it so. We therefore think that the trial court properly struck defendants' second amended defense as it related to the Mechanic's Lien Act and to custom and usage defenses which would have application only to contracts for the improvement of real estate. The fact that plaintiff retained its right under the 1957 contract to enforce the mechanic's lien filed against the property in question in the event of defendants' default does not alter our conclusion that the 1957 contract was not one for the improvement of real estate.

The judgment is reversed and the cause is remanded with directions to vacate the judgment and deny the motion to strike the second amended defense, counterclaim and setoff, and for such other and further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed and cause  
remanded with directions.

Dempsey, P. J., and McCormick, J., concur.

Abstract only.

*Letter from Clerk of  
Court dated 1-12-60  
to substitute entirely  
new Page 8 herewith  
attached*



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT - SECOND DIVISION  
OCTOBER TERM, A. D. 1959.

DOROTHY O. THIESS,  
Plaintiff-Appellant,

-vs-

HENRY W. THIESS,  
Defendant-Appellee.

Appeal from the  
Circuit Court of  
Will County.

CROW, J.

This is an appeal by the plaintiff from an order dismissing a suit for divorce for want of equity. The plaintiff, Dorothy O. Thiess, charged in her complaint that the defendant, Henry W. Thiess, her husband, wilfully deserted and absented himself from her on October 13, 1957, without any reasonable cause, for a space of one year and upward, and has persisted in such desertion. The defendant filed an answer, which so far as now material, admitted that he left the plaintiff on or about October 13, 1957, but denied that he deserted or absented himself from the plaintiff wilfully or without any reasonable cause, and denied that his desertion or absence, if any, had continued for one year. The plaintiff and two witnesses testified on behalf of the plaintiff. The defendant was not present in Court at the time of the hearing, but appeared by an attorney, offered no evidence, and did not cross examine any of the plaintiff's witnesses. The defendant-appellee has filed no brief in this court.

12/2/2

RECEIVED

TO THE HONORABLE  
MEMBERS OF THE  
HOUSE OF REPRESENTATIVES  
WASHINGTON, D. C.

FROM THE  
UNITED STATES DEPARTMENT OF AGRICULTURE  
WASHINGTON, D. C.

SUBJECT: [Illegible]

12/2/2

Dear Sirs:

I have the honor to acknowledge the receipt of your letter of the 11th inst. regarding the matter of the [illegible] and to inform you that the same has been forwarded to the proper authorities for their consideration.

The [illegible] has been assigned to the [illegible] and will be [illegible] in the near future.

I am, Sir, very respectfully,  
Your obedient servant,  
[Illegible Signature]



The sole question presented is whether or not the evidence entitled the plaintiff to a decree of divorce on the alleged grounds of desertion. The plaintiff testified that she was married to the defendant on June 30, 1956, they had no children, she and the defendant lived together until October 13, 1957, the defendant left her on that date, she gave him no reason for leaving, and he has never returned. She testified also that when she married the defendant she was a widow and had two children by her previous marriage, she had always conducted herself as a good, faithful wife, and was true to her marriage vows. She testified further that she and the defendant had entered into a property settlement agreement on February 2, 1959. One of the other witnesses for the plaintiff testified that he and his wife visited at the home of the plaintiff and the defendant frequently, - about twice a week, she prepared the meals and provided a home, they were at the Thiess' home late in the afternoon on October 13, 1957 when the plaintiff informed them that the defendant had left her, and that the plaintiff and defendant have been living apart since October 13, 1957, and this witness had not seen the defendant at the former marital home since that date. The other witness for the plaintiff testified that on October 13, 1957 the plaintiff and the defendant had a disagreement and the defendant left, the plaintiff gave him no reason to leave, and she has lived separate and apart since October 13, 1957.

During the direct examination of the plaintiff the court made some inquiry of the plaintiff and, so far as material, there were the following questions and answers:

THE HOUSE

FOR THE YEAR 1911

AND THE HOUSE

OF REPRESENTATIVES

OF THE STATE

OF NEW YORK

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The Court: What happened on October 13, 1957?

A. Mr. Thiess left and he has been living elsewhere from that time.

The Court: What did he do or say at that time?

The Witness: Well, we probably did agree to disagree.

The Court: What did he say or do?

The Witness: He just walked out and left.

The Court: What do you mean?

The Witness: Well, it was one of those marriages where we didn't get along. My first husband had died, I had had two (2) children, and we decided to separate.

Q. Did you have an argument with him before he left?

A. Yes.

Q. At the conclusion of the argument he left you and he never returned to you?

A. That is true.

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Q. Explain in detail just what took place on October 13, 1957, the exact words of your conversation.

A. I can't tell the exact record or words.

Q. Do the best you can.

A. I was married before. My former husband worked. He wanted me to make a joint settlement with him and not to leave anything to my children. He said that it was all or nothing, either I sign everything to him or he would leave. He left when I told him that I was not, that I wasn't going to sign over my property from my first husband. He and I had worked so hard to get it, and I felt my children were entitled to it.

Q. And because of this, he left?

A. Yes, he said that it wasn't a marriage if everything wasn't signed over to him, but I thought my children were entitled to what we worked for. After we were married now we could start to work.

Q. Did you tell him to leave?

A. I didn't tell him to leave, he walked out.

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• *Journal of the American Medical Association* •

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After the testimony was concluded the Court found the issues for the defendant and that the alleged grounds for divorce had not been proven, as the record shows that the separation was by agreement between the parties, and ordered the suit dismissed for want of equity.

The plaintiff urges that the Court misconstrued the testimony, and cites FRANK vs. FRANK (1913) 173 Ill. App. 557 as a case of a somewhat similar nature. There the wife sued for divorce on a charge of desertion and the husband appeared and defended. The defendant admitted leaving but testified that after a quarrel with his wife he had said: "We will part; you go your way and I mine," and she had replied: "All right", and thereupon he had left. The Court held that this testimony did not show that the defendant had reasonable cause for leaving his wife, that the desertion was not collusive because it did not appear the plaintiff had assented to the desertion for the purpose of obtaining a divorce, and that she was entitled to a decree on the grounds of desertion under the evidence, and the Appellate Court reversed and remanded an order dismissing the bill, with directions to enter a decree in accordance with the prayer.

In the instant case the Trial Court was concerned with the words of the plaintiff, - "Well, we probably did agree to disagree" and " \* \* \* and we decided to separate". Although we understand the Court's concern with those particular words used by the plaintiff in her testimony, we do not believe that these words, taken with all the other evidence, justified the defendant in physically leaving the plaintiff and not returning. Those particular words used by the plaintiff in her testimony are only conclusions or opinions which she

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drew from the specific facts that the defendant had wanted her to make a property settlement and not leave anything to her children by her first marriage and that she had stated that she wouldn't so sign all of her property over to him and that evidently because of that he had left her. There is no showing here in these facts, taking the evidence as a whole, that the actual physical separation which continued for more than one year, was for the purpose of trying to give grounds for divorce where grounds did not otherwise exist, or was really in fact by mutual agreement of the parties. The plaintiff's language in testifying "we probably did agree to disagree" and "we decided to separate" was simply descriptive, characterizing language, of an opinionative nature, expressive of conclusions. It was used only while testifying, apparently, and was not factual in nature as to any relevant, competent, material facts or occurrences between the parties at the time. All she could properly testify about were the actual factual matters relevant to the issue, - what did he say or do, what did she say or do, - what in fact occurred. The witness' loose, vague, general descriptions or characterizations or opinions were not competent, relevant, material, or proper. A living separate and apart by mutual agreement and not against the will of the plaintiff of course does not constitute desertion: GARVY v. GARVY (1935) 282 Ill. App. 485, but such is not the present case.

We believe the competent, relevant evidence, and its reasonable inferences and intendments sustained the plaintiff's complaint and that the required statutory fault was in the defendant, and not in her, and that there is a lack





of competent evidence to sustain the order dismissing the suit. The competent, relevant evidence is not conflicting, and we believe, from a consideration of the whole record, that the evidence does not justify the order. The defendant voluntarily left the plaintiff, he had no legal cause to do so, and they have not lived together for more than a year: STEVENS v. STEVENS (1904) 210 Ill. 362. He has "wilfully deserted or absented himself \* \* from the \* \* wife, without any reasonable cause, for the space of one year": CH. 40, ILL. REV. STATS., 1959, par. 1.

The order is reversed and the cause remanded with directions to enter a decree of divorce as prayed for in the complaint.

REVERSED AND REMANDED  
with DIRECTIONS.

*Concurs*  
*R. J. Wright*  
Solfisburg, P.J. Concurs

Wright, J. Concurs



47653

ANNIE L. JONES, ADMINISTRATOR OF  
THE ESTATE OF WILLIE B. JONES,  
DECEASED.

Plaintiff-Appellant.

v.

CHICAGO TRANSIT AUTHORITY, a MUNICIPAL  
CORPORATION, and LAFAYETTE GARMONY.

Defendants-Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an action brought by Annie L. Jones, as Administratrix of the estate of her husband, Willie B. Jones, deceased, against the Chicago Transit Authority and its motor-man for damages resulting from the wrongful death of the deceased when he was struck by a streetcar operated by the Chicago Transit Authority on May 28, 1952, near the intersection of Cottage Grove Avenue and 46th Street, Chicago, Illinois. Deceased was in route to his place of employment early on that date and was struck by a southbound streetcar as he crossed Cottage Grove Avenue south of its intersection with 46th Street with the intention of boarding an approaching northbound streetcar. Conflicting testimony was presented on the question of whether deceased was walking or running when he crossed Cottage Grove Avenue and whether the car was travelling at an excessive rate of speed. The jury returned a verdict of not guilty and judgment was entered on that verdict. This appeal is from that order.



Appellant contends that the verdict was contrary to the manifest weight of the evidence. A verdict based on conflicting evidence and approved by the trial judge should not be disturbed on appeal unless clearly contrary to the manifest weight of the evidence. To be so contrary the opposite conclusion must be clearly evident. *Ritter v. Hatteberg* 14 Ill. App.2d 548. The evidence tended to show that deceased was hurrying across the street; that the streetcar was proceeding at a reasonable speed; that deceased was aware of the approach of the streetcar; that deceased failed to keep a proper lookout for the approaching car; and that his negligence was the proximate cause of the accident. After an examination of all the evidence, we conclude that the verdict was not against the manifest weight of the evidence. As the court said in *Bunton v. Illinois Cent. R.R.*, 15 Ill. App.2d 311, at page 320:

"It is well settled that if there is any evidence which would support the finding of the jury, the verdict of the jury should not be disturbed and a judgment non obstante veredicto should not be entered. In considering these questions all the evidence tendered in support of the verdict must be considered in its most favorable intentions to the verdict. Any questions of disputed evidence or fact must be resolved in the most favorable manner in favor of the verdict. [citing cases]."

And in *Allendorf v. E. J. & E. Ry.*, 8 Ill.2d 164, at page 171, the court said:

"Judges are not free to reweigh the evidence and set aside the jury verdict merely because they, as individuals, might have arrived at different conclusions. (*Tennant v. Peoria and Pekin Union R.R.*, 321 U.S. 29, 88 L.Ed. 520). Only where there is a complete absence of probative facts to support the conclusion reached, does reversible error appear. [citing cases]"



Appellant also maintains that the court erred in allowing defendant to impeach his own witness, Rosie Hill, through the use of a prior inconsistent statement not introduced during the direct examination of the witness. We have considered this contention and are unable to find any prejudice which resulted from the admission of such evidence. The objections of plaintiff's counsel interrupted a large part of the questioning by the defendant on redirect, and the uninterrupted portions of the testimony was cumulative to that given by other witnesses. The latitude to be allowed in the examination of witnesses rests largely in the discretion of the trial court, and a cause will not be reversed for alleged improper rulings unless such discretion has been abused. *Brennen v. Carterville Coal Co.*, 241 Ill. 610. Where no prejudice results from alleged error committed in the trial court, the judgment will not be disturbed on appeal. *Benedict v. Dakin*, 243 Ill. 384; *Moran v. Gatz*, 327 Ill. App. 480; *Little v. Gogotz*, 324 Ill. App. 516.

Appellant also assigns error to appellee's use on redirect examination of his witness Herbert De Cuir, of certain statements acquired soon after the accident. No reference to the statements was made by appellee on direct examination, but on cross examination while discussing another written statement, witness De Cuir stated that the statement was "the same" as one signed earlier for appellee. There was an important difference between the two in that one said that deceased was walking at the time of the accident and the other said that he was running.





Appellee on redirect then questioned the witness on the variance between the statements by asking which was true, to which appellant objected. *McCray v. Illinois Central R.R.*, 12 Ill. App.2d 425, relied upon by appellant, is not in point in the case now before us since in that case the intended use of the statements was to impeach the party's own witness after a cross examination in which his testimony was consistent with that given on direct examination. In the instant case, the cross examination left in the minds of the jurors an impression that an especially damaging statement had been given to appellee soon after the accident and that he had not introduced it on direct examination. Under these conditions, it was not an abuse of discretion for the trial court to allow, on redirect examination, the use of the statement mentioned on cross examination. When there is matter discussed on cross examination which is not included in material covered on direct examination, the redirect examination may explore the new material. *Mayer v. Brensinger*, 180 Ill. 110.

Appellant contends that the court erred in not instructing the jury that it was the duty of the motorman to sound a bell or other warning device. Such warning would have been to no avail since the deceased already had been made aware of the approaching car. When considered with the other instructions which indicated that the motorman had a duty to use reasonable care both at the intersection and after passing it, the failure to give the instruction requested by the plaintiff did not constitute prejudicial error. As the court held in *Duffy v. Cortesi*, 2 Ill.2d 511, at page 515:



"The trend of judicial opinion reveals a reluctance to reverse cases on the ground of technical errors in instructions; hence, courts have reiterated that the instructions will be considered as a whole, and where the jury has not been misled, and the complaining party's rights have not been prejudiced by minor irregularities, such errors will not be deemed grounds for reversal. (Kavanaugh v. Washburn, 320 Ill. App. 250; Stephens v. Weigel, 336 Ill. App. 36; Anderson v. Brown, 340 Ill. App. 613.)"

Appellant also contends that the court erred in sustaining an objection to a characterization by a witness of the speed of the streetcar as "very fast". When considered in relation to the fact that the witness had previously indicated to the court his conception of the speed of the streetcar in miles per hour, the refusal of the court to allow the term "very fast" to be used was not prejudicial to the appellant.

For the reasons indicated, the judgment of the trial court is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.



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47713

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|----------------------------------------------|---|---------------|
| OLIVET BAPTIST CHURCH, a religious           | ) |               |
| corporation, STEPHEN A. GRIFFIN,             | ) |               |
| JOHN H. MAPP, DR. F. D. MOORE, HENRY         | ) |               |
| MOORE, C. D. ANDERSON, Ch. H. PETERSON,      | ) |               |
| ODESSA REED, B. McF. STEPHENS, LOTTIE        | ) | APPEAL FROM   |
| JORDAN, AMOS MERREDITH, JUNIUS SAMON,        | ) |               |
| HENRY THOMPSON, RICHARD SKINNER, LOTTIE      | ) |               |
| S. HOLLINGSWORTH, ERNEST FORT, DANIEL TYLER, | ) | CIRCUIT COURT |
| S. W. CRAWFORD,                              | ) |               |
|                                              | ) |               |
| Appellants,                                  | ) | COOK COUNTY   |
|                                              | ) |               |
| v.                                           | ) |               |
|                                              | ) |               |
| JOSEPH H. JACKSON, MASON PEARRY, NATHAN      | ) |               |
| CLARK, and T. P. HINES, AND CHICAGO          | ) |               |
| NATIONAL BANK, A NATIONAL BANKING CORPORA-   | ) |               |
| TION,                                        | ) |               |
|                                              | ) |               |
| Appellees.                                   | ) |               |

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order dismissing the complaint on defendant's motion. Plaintiffs, who claim to be deacons, trustees, members and officers of the Olivet Baptist Church, sued for an accounting and to recover certain U.S. Government bonds allegedly misappropriated by the church pastor and other defendants.

The complaint contained various allegations of a general nature, but nothing is specifically alleged which indicates that complainants are entitled to relief.

A claim of res judicata is made in the lower court predicated upon another hearing had in the Superior Court. No transcript of the proceedings on the date of the hearing of



defendant's motion to dismiss in this case, from which it is adequate to say the grounds for the prior decree, have been filed in this court. The record in this case is incomplete. Plaintiff has the duty of presenting the record to this court, and unless he does so, we have no way of knowing whether the issues have been decided in a prior case, what the court has decided below or the basis for its decision. If the record is not preserved by the plaintiffs they are not in a position to complain upon the ground of errors which do not appear in the record presented for consideration in this court. Aukopovicz v. Heymann, 300 Ill. App. 243; People v. Belmont Radio Corp., 388 Ill. 11; Cregar v. Spitzer, 244 Ill. 208. The record does not show upon what ground the action of the court was based in dismissing the complaint. In Lunt v. Lorscheider, 285 Ill. 589, the court said of this problem:

"On such a record it will be presumed, in favor of the ruling of the court, that a sufficient cause to justify its action was made to appear. Consolidated Coal Co. v. Peers, 166 Ill. 361; Fanning v. Russell, 81 id. 398."

The lower court must be presumed to have acted properly in exercising its powers and this court must give cognizance to that presumption until the opposite is shown.

The motions heretofore filed in this cause have been considered and are disposed of by the general order. The order of the trial court dismissing the complaint is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.





47795

GEORGE KAYE,

Plaintiff-Appellant,

v.

ELEANOR KREMER, LOUIS M. KREMER  
and ARTHUR S. BLUESTEIN,

Defendants-Appellees

and I. HARVEY LEVINSON,

Defendant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

23 I.A. 536<sup>2d</sup>

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment following orders dismissing his action for damages for false arrest, imprisonment and malicious prosecution against three of four defendants. The court found that there is no "just reason for delaying enforcement or appeal."

When the complaint was filed on May 24, 1954, plaintiff demanded a jury trial. On July 26, 1954, the defendants filed an answer joining issue. About five years after the action was begun three of the defendants (the appellees), pursuant to an order, withdrew their answer and filed a motion to dismiss the cause with prejudice under the provisions of Sec. 48 (1) (f) of the Civil Practice Act based upon plaintiff's release. Plaintiff filed an affidavit in opposition. He maintains that the court erred in allowing these defendants to withdraw their answer and file the motion



per letter from Clerk of Court  
dated 2-21-60

-2-

after the answer, which did not allege the affirmative defense of release, had been on file for five years. The court in permitting the withdrawal of the answer and the filing of the motion acted within its sound discretion.

<sup>PLAINTIFF</sup>  
~~Defendant~~ asserts that in resolving the factual issues as to the effect and validity of the release the court deprived him of a trial by jury. Paragraph 3 of Section 48 of the Practice Act states that if a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it ~~if~~ the action ~~is one~~ at law and a jury demand has been filed by the opposite party in apt time. Under Section 48 (3) the court had the right to hear evidence to determine whether there was a material and genuine disputed question of fact. The judgment orders show that the trial judge considered the affidavits, exhibits and testimony taken in open court. The record does not contain a report of proceedings with a transcript of the testimony. On appeal all reasonable presumptions are in favor of the action of the court below and the burden is on the party alleging error to overcome this presumption by showing affirmatively the error alleged. Where the determination of a question presented for review depends on evidence and the record on appeal does not show the evidence introduced, it will be presumed that the evidence was sufficient to sustain the ruling. Union Drainage



-3-

District v. Hamilton, 390 Ill. 487; Goldschmidt v. Chicago Transit Authority, 335 Ill. App. 461; 222 East Chestnut Street Corporation v. Murphy, 325 Ill. App. 392; In re Estate of Murray, 310 Ill. App. 121. The affidavits, testimony and exhibits convinced the trial judge that there was no material and genuine issue of fact. We assume that the absent report of proceedings supports the judgment. Without a genuine disputed question of fact there was no issue to be resolved by a jury.

The orders and judgments are affirmed.

ORDERS AND JUDGMENTS AFFIRMED.

BRYANT, P. J., and FRIEND, J., CONCUR.



WILEY CHAMBERS, for the use of  
DOLLIE HAWKINS.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

2d

8

It appears that on June 24, 1956 the plaintiff, Dollie Hawkins, was a passenger in an automobile owned by her husband, Louis Hawkins. The car was being driven by Wiley Chambers, brother of Mrs. Hawkins. Plaintiff's husband, Louis Hawkins, was in the car at the time of the accident. Mrs. Hawkins claims to have received injuries resulting from the alleged wilful and wanton misconduct of her brother in the operation of the car. Prudence was the automobile liability insurer of Louis Hawkins. Suit was instituted against Wiley Chambers on July 23, 1957. Default was entered for want of an appearance by Chambers, and judgment was had in favor of Dollie Hawkins against Chambers in the amount of \$5000.00. Execution issued, and the instant





garnishment proceeding was brought against Prudence, based upon its contractual duty with its assured, Louis Hawkins, to defend Wiley Chambers, and to pay on his behalf, as an additional assured under the policy, all sums he became legally obligated to pay by virtue of the judgment.

Prudence defended the garnishment proceeding on the theory that it had no notice of the lawsuit, that because of lack of co-operation on the part of its insured, Louis Hawkins, and his driver, Wiley Chambers, the defendant in the original suit, the garnishee had no opportunity nor duty to defend the suit, and that the evidence and relationship of the benefiting parties showed collusion, since Dollie Hawkins, the plaintiff in the original suit, was the wife of the assured, who was also a passenger in his automobile at the time Dollie Hawkins sustained her alleged injuries, and while the car was being driven by her brother, Wiley Chambers.

The controlling question is factual, namely, whether the garnishee, Prudence, had legal notice of the lawsuit. Its policy required Louis Hawkins, the insured, to immediately forward to the company every demand, notice, summons or other process received by him or his representative; and it provided that no action would lie against the company unless the insured had "fully complied with all the terms" of the policy, and required that the assistance and co-operation of the insured be given, under the terms and conditions of the policy.

It is conceded that summons was lawfully served on Wiley Chambers. Whether the summons was immediately forwarded



to Prudence, as required by the terms of the policy, constitutes the basis of the controversy presented. Chambers testified that, when served, he gave the summons to the insured, Hawkins. Hawkins testified that he "just addressed it [the envelope in which he had put the summons] to 407 Prudence--or 407 South Wabash"; that he ascertained the address of Prudence by looking it up in the telephone directory. The direct examination proceeded:

Q. Were you certain at that time that you had the right address?

A. Well, I was not for sure, but I mailed it to that address.

Q. Did you use the same address that you found in the telephone book?

A. Yes.

Q. Would that be 407 South Dearborn [the correct address]?

A. Yes.

He also stated that the envelope was never returned to him, but there is no evidence, until Dollie Hawkins was called in rebuttal immediately before the termination of the hearing, by any of the witnesses as to whether the envelope was stamped or whether it carried a return address.

After plaintiff rested, defendant proceeded with its defense. Louis Albano was called as a witness. He testified that the Prudence offices had been located at 407 South Dearborn street for approximately nine years, and that he was employed by Prudence as office manager and had custody of all the files.



He denied that any summons or statement of claim had come to his attention or, so far as he knew, had ever been received by Prudence. He was followed by Joseph Semper, a claims examiner for Prudence, who testified that about March 23, 1958 he had a two-hour conference with Chambers and Hawkins at the Prudence office. It appears that, as a result of the judgment against Chambers, his pay check had been stopped, and he wanted to ascertain whether Semper could do anything to have it released. In the course of that conversation Chambers said that he had turned the summons over to Hawkins, whereupon Semper asked Hawkins what he had done with it; Hawkins replied that he threw it away. Semper then asked whether they had notified Prudence in any way about the summons, and both Chambers and Hawkins said that they had not.

Defendant then rested, and, after an adjournment until later in the day, plaintiff called Dollie Hawkins as a rebuttal witness. She testified that earlier in the day she had heard her husband testify that he had received a summons from Wiley Chambers in July 1957, and that she was present at the time the summons was delivered. The examination continued:

Q. Do you know what happened to the summons after it was given to your husband?

A. It was mailed to the Prudence Mutual--

Mr. Dempsey [defense counsel]: I submit that this testimony is not in rebuttal. It is an additional part of plaintiff's case. He had an opportunity to put it on before.

I submit it should have been put on at that time.



Mr. Preston[plaintiff's counsel]: They have denied of course that the summons was received, Your Honor, and we want to get the additional rebuttal testimony to show that it was mailed.

The Court: All right. Overruled. She may testify.

Mr. Preston: Q. Do you know to whom the summons was mailed?

The Witness: A. Prudence Mutual.

Q. The address?

A. 407 South Dearborn Street.

Q. How did you determine the address?

A. I looked at the phone book.

Mr. Dempsey: I object. After we have already testified, and after you know what the plaintiff testified to this morning, now to call this woman to the stand to clarify the situation, I think it is highly improper, certainly.

The Court: Overruled. She may answer.

I determined the address to which it should be sent by looking it up in the phone directory. My husband was present at the time. I put it in an envelope. There was a stamp on the envelope and I deposited the letter in the mailbox.

Following cross-examination by defense counsel, Mrs. Hawkins was again examined by Mr. Preston, and then the court propounded the following interrogatories:

The Court: Q. You say you got the address out of the telephone book?

The Witness: A. Yes.

The Court: Q. Who wrote it down?

The Witness: A. It was my handwriting.

The Court: Q. Who addressed the envelope?





The Witness: A. I did.

The Court: Q. Was your husband there?

The Witness: A. Yes, he was.

The Court: Q. He put it in the mail box?

The Witness: A. He did.

The Court: Q. He did?

The Witness: A. Yes, he mailed it

Earlier in Mrs. Hawkins' testimony, it will be recalled, she stated that she had mailed the summons.

In his closing remarks before the court, defense counsel argued that Mrs. Hawkins' testimony--coming after an adjournment of some two and one-half hours and after both plaintiff and defendant had closed their case--did not constitute rebuttal at all but was, rather, an attempt to bolster a weak case.

The trial judge, in an oral opinion at the close of all the evidence, said that he recognized this type of claim as one which lends itself to collusion between the insured and the injured party, and that he recognized the passenger and driver relationship that existed. With respect to the testimony that Hawkins had thrown the summons away, the trial judge observed that it was hard to believe that this would be the normal action of any person. He evidently predicated his finding on this conclusion, for he stated: "I cannot see how, for these two reasons particularly, one, that it does not seem like the party would throw away the summons, and, secondly, that Mr. Semper says that he told him that he threw it away, but he did not do anything more concrete about it."



It should be noted that, after Semper's testimony as to the disposition of the summons by Hawkins, neither Hawkins nor Chambers was called to testify in rebuttal. They were both present at the conference with Semper and could have been called to deny Semper's statement if it was not true; yet no such rebuttal testimony was offered. In *Pipal v. Grand Trunk Western Ry.*, 341 Ill. 320, the court said: "The failure of a party to a suit to produce evidence available to him gives rise to a presumption against him." See also *Morris v. Pennsylvania R.R.*, 10 Ill. App.2d 24, *Zegarski v. Ashland Savings & Loan Ass'n*, 4 Ill. App.2d 118, and cases cited therein.

It has frequently been held that while mailing of the notice, properly stamped and addressed, would, in the absence of evidence to the contrary, raise a presumption that it was received (*Bickerdike v. Allen*, 157 Ill. 95, *Keogh v. Peck*, 316 Ill. 318, *Cordell v. Solomon*, 234 Ill. App. 430), the presumption may be overcome by positive testimony of witnesses that it was not received, especially where there is nothing in the record which tends to discredit their testimony (*Meyer v. Krohn*, 114 Ill. 574, *Alger v. Community Amusements Corp.*, 320 Ill. App. 184).

The trial judge's finding that plaintiff's evidence created presumptive evidence of receipt of summons by Prudence overlooks, as we view it, the foregoing principles of law and gives unwarranted credence to plaintiff's tenuous evidence as to:



- (a) who looked up the address;
- (b) who addressed the envelope; and
- (c) who mailed the summons, and from what post office or mail box it was mailed.

After a careful examination and review of all the evidence adduced upon the hearing, and the law applicable thereto, we are constrained to find, as a matter of fact, that the summons was not received by the garnishee, and that the conditions of the policy were not complied with.

Accordingly, the judgment of the Municipal Court is reversed, and the cause remanded with directions to enter a judgment discharging the garnishee.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

BRYANT, P. J., and BURKE, J., CONCUR.



47794

ROBERTA M. ELKINS,

Appellant,

v.

JOSEPH KOPP and MAURICE J. GREENBAUM,  
d/b/a JAM INN, PRUDENTIAL INSURANCE  
CO., a Corporation, KERBEL RESTAURANT,  
INC., and LAKEVIEW CHARITABLE FOUNDATION,  
a Corporation,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

25 I.A.<sup>2d</sup> 309

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This dram shop action for injury to means of support (Ill. Rev. Stat. 1957, Ch. 43, §135, as amended in 1955) was dismissed because suit was not brought in the name of the injured person, plaintiff's husband, the provider of the support. Plaintiff has appealed.

The loss occurred on August 16, 1957, and suit was filed August 8, 1958, by Roberta M. Elkins, wife of the injured person, in her own name instead of "in the name of the person injured \* \* \* from whom said support was furnished," as directed by section 135.

While the original suit was still pending, but more than one year after the cause of action accrued, plaintiff moved to amend the complaint by substituting the name of Robert Lee Elkins, her husband, the injured party, as the proper party plaintiff, in lieu of herself. This the court denied and dismissed the suit on motion of defendant, on the ground that Roberta M. Elkins had no right of action under the Dram Shop Act, and her husband, the





person sought to be substituted as plaintiff, did not, at time of dismissal, have a right of action, as provided in the 1955 Illinois Dram Shop Act, effective July 1, 1956, because the time for commencing the action for loss of support, by the person injured, from whom said support was furnished, had expired.

We believe the principal question is whether section 46 of the Civil Practice Act (Ill. Rev. Stat. 1955, Ch. 110) should be applied to suits brought under the Dram Shop Act.

Defendants contend that the instant case is one where the only person given a right of action did not commence the law suit within the time allowed by the Dram Shop Act; that the law suit brought by the wife is a nullity, because she did not have a right of action under the Dram Shop Act, and, therefore, a complaint filed in her name could not be amended; and that section 46 is not applicable to a Dram Shop Act case.

Until the amendment, effective July 1, 1956, a wife was named among those who had a right of action in their own names for injury to means of support. The Act was amended so as to provide for a single action in the name of the injured person (the provider), for the exclusive benefit of the person or persons injured in loss of support. The amount recovered is to be distributed to such persons in proportions determined by the judgment or verdict rendered in said action, and the right to recover is vested solely in the person injured or, if he be deceased, in his personal representative. The purpose of the amendment was to establish a method of uniform procedure in loss



of support cases, making it a class action, with the amount recovered to be distributed among the members of the claimant class. (Steller v. Miles, 17 Ill. App.2d 435.) However, the person injured in loss of support is the real person in the suit, with no substantial interest whatever being in the person injured. The latter's name is used in order that the action may be maintained by a single representative of the class of persons who qualify as those injured in their means of support.

It has been held that a party who is entitled to the benefit of the recovery is the real party, and the law gives him the entire control of the process and management of the suit to its termination, and of the judgment, when recovered, and of the process for its enforcement. He has all the substantial and actual rights of a real plaintiff and possesses full power to act as if he were the nominal plaintiff. Weckler Brick Co. v. McLean, 124 Ill. App. 309.

Cases cited by defendants, showing the liability imposed is of statutory origin and exclusively defined in the Dram Shop Act, and that the cause of action cannot be made analogous to other actions, (Howlett v. Doglio, 402 Ill. 311; Shelton v. Woolsey, 20 Ill. App.2d 401; Thompson v. Capasso, 21 Ill. App.2d 1) are not in point and are not persuasive to sustain their contention that section 46 of the Civil Practice Act is not applicable to a dram shop case. We believe that the substitution of the name of the party having the legal right to sue for the claim for which the action was brought, instead of another party improperly named



as plaintiff, is in no sense the commencement of a new action. (Beresh v. Knights of Honor, 255 Ill. 122 (1912).) One of the purposes of section 46 of the Civil Practice Act was to prevent a party to a suit, by inadvertence, from losing his right of action by limitations between the time the complaint was filed and the time of the proposed amendment. The statute permits liberal amendments to pleadings and should be construed by the court so as not to deprive a party of his cause of action. Williams v. Fredenhagen, 350 Ill. App. 26 (1953).

In Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222, referred to as the landmark among cases dealing with the construction of section 46, it was stated that "it is not necessary that the original pleading technically state a cause of action, or that a cause of action set out in the amendment be substantially the same as any cause of action stated in the original pleading. The term 'same transaction or occurrence,' so used in the statute, means the same suit" and evinces "the legislative intent \* \* \* to preserve causes of action against loss by reason of technical rules of pleading."

The cases holding that the recommencement provisions of the Limitations Act do not apply to dram shop actions are not in point. The instant motion to amend was made before any final order and while the action was still pending.

We conclude that, in this case, the substitution of the name of the injured person should have been permitted, as the causes of action asserted in the original complaint, and as it is



-5-

sought to be amended, "grew out of the same transaction or occurrence set up in the original pleading." Geneva Construction Co. v. Martin Transfer Co., 4 Ill.2d 273 (1954).

We believe the court was in error in denying plaintiff's motion to amend and in dismissing the action. Therefore, the orders appealed from are reversed and the cause remanded for further proceedings in accordance with the views expressed herein.

REVERSED AND REMANDED.

KILEY, J., CONCURS.

BURMAN, J., TOOK NO PART.

Abstract only.





47809

LOOP RESTAURANT INC., an Illinois  
corporation,

Appellant,

v.

WILLIAM G. MILOTA, Bailiff of the  
Municipal Court of Chicago, and  
KUSPER OLD FORT DEARBORN CO.,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

23 I.A. 210

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a trial of right of property suit. The court found that property claimed by plaintiff, Loop Restaurant Inc., an Illinois corporation, was not exempt from execution and entered judgment for defendants. Plaintiff appeals.

Defendant, Kusper Old Fort Dearborn Co., procured a judgment of \$419.60 on February 6, 1959, against the 426 South Wabash Corp., and placed a writ of execution with the bailiff of the Municipal Court on February 11, 1959. On March 4, 1959, the bailiff made a levy on restaurant equipment at 426 South Wabash Avenue, the subject of the instant suit, which plaintiff claims as owner as the result of a chattel mortgage foreclosure sale held on February 20, 1959. The levying judgment creditor, defendant, Kusper Old Fort Dearborn Co., asserts the sale was fraudulently and collusively perpetrated to defraud creditors of 426 South Wabash Corp. The trial court found the sale was not a bona fide transaction as against creditors of the 426 South Wabash Corp.



The evidence shows that Leone Giovan, at her husband's recommendation, made a loan of \$18,000 to the 426 South Wabash Corp. She produced fourteen cancelled checks dated from August 16, 1956, through September, 1957, bearing amounts from \$500 to \$1500. On October 6, 1958, she was given a note and chattel mortgage to secure this indebtedness, which was recorded October 9, 1958. On or about February 15, 1959, the chattel mortgage and note were delivered to mortgagee's attorney, who officed with plaintiff's attorneys as a subtenant. Pursuant to notice posted on February 17, 1959, a mortgagee sale was held at 105 West Madison Street on February 20, 1959, by and in the office of mortgagee's attorney, as her agent. At the sale there was no one to bid except one of plaintiff's attorneys, who made a bid of \$10,000, for and on behalf of plaintiff, Loop Restaurant Inc. The offer was accepted and on February 23, 1959, a chattel mortgagee's bill of sale was executed, subject to "certain conditional sales contracts," amounting to approximately \$4,000, and possible withholding tax claims of the Internal Revenue Bureau. Payment of the purchase price of \$10,000 was made by an installment note, dated February 23, 1959, payable at the rate of \$100 per month, and secured by a chattel mortgage on the fixtures.

Nick Pappas, a stockholder and secretary of plaintiff corporation, testified plaintiff "took over the business" at 426 South Wabash Avenue on February 22, 1959, and that it has been operated since that time by Peter Goulakos, also a stockholder.



Defendants offered no testimony to contradict plaintiff's witnesses but argued it was a "phony mortgage and phony sale." The record indicates there was no cessation of business during the purported change of ownership.

Plaintiff's principal contention, which we believe to be determinative, is that the trial court's finding is against the manifest weight of the evidence. It argues that the testimony of its witnesses, being uncontradicted either by positive testimony or circumstances, cannot be disregarded, and was sufficient to prove plaintiff's right and title to the possession of the personal property in question. The Illinois rule is that where the testimony of a witness is uncontradicted either by positive testimony or circumstances, and is not inherently improbable, it cannot be disregarded but must be considered with all the other evidence. (Dill v. Widman, 413 Ill. 448, 454, (1952).) Conversely, the mere assertion of any witness does not, of itself, need to be believed, even though he is unimpeached in any manner, because it is also true that there may be such an inherent improbability in the testimony of the witness as to induce the court to disregard it, even in the absence of conflicting testimony. If his testimony is such as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him. Mannen v. Norris, 338 Ill. 322 (1930).

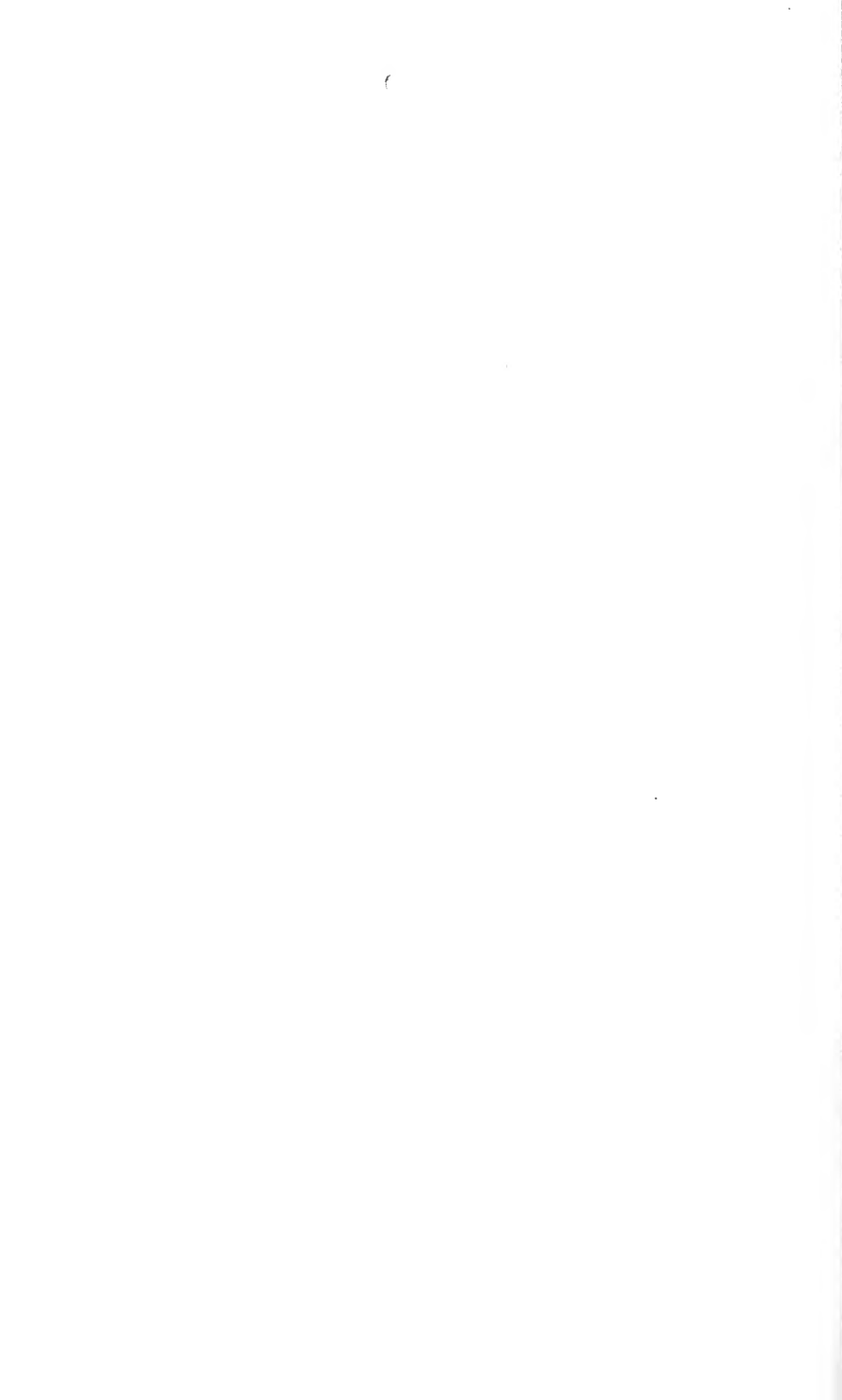


In the instant case, to reach the conclusion it did, the trial court had to reject the evidence offered by plaintiff. The judge saw and heard the witnesses and observed their manner of testifying, and was in a better position to determine the inherent improbability of the testimony and the weight to be given it, than we are. After a careful examination of the evidence in this case, we are unable to say that the judgment of the trial court is clearly and palpably against the weight of the evidence, so as to justify a reversal of the judgment. Judgment affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.





47736 )  
47737 ) Consolidated  
47805 )

SHAMROCK RESTAURANT COMPANY,

Plaintiff-Appellant,

v.

STATE MUTUAL LIFE ASSURANCE COMPANY  
OF AMERICA, CARROLL H. SUDLER, JR.,  
as Trustee under the provisions of a  
Trust Agreement dated September 16,  
1957, CARROLL H. SUDLER, JR., and  
LOUIS C. SUDLER, copartners doing  
business under the name of SUDLER &  
COMPANY, and JAY AND CEE CATERING  
COMPANY, an Illinois corporation,

Defendants-Appellees.

APPEAL FROM

CIRCUIT COURT

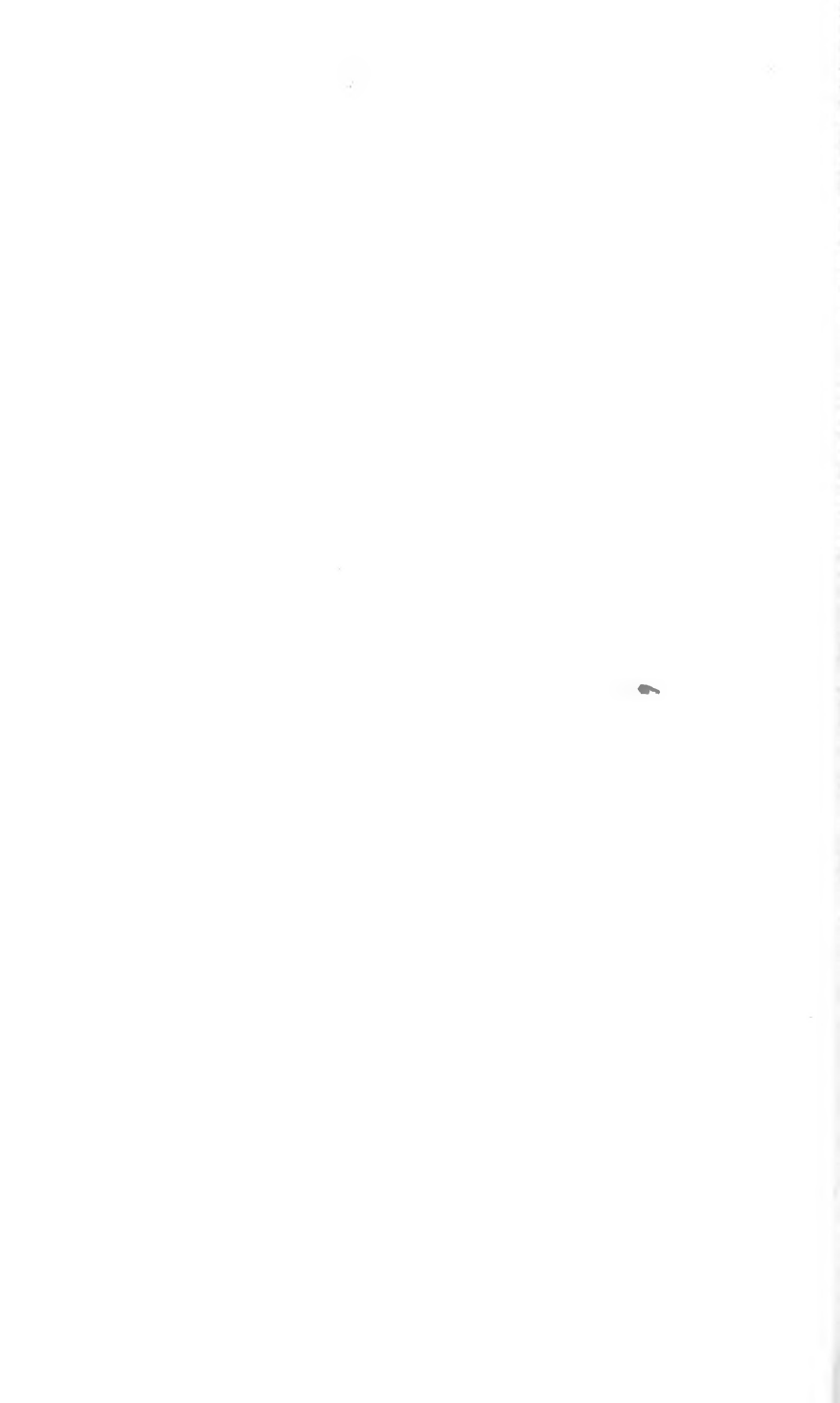
COOK COUNTY

23 LA. 2d 311

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This suit sought judgment declaring that plaintiff had the right of possession under a lease. The court found that "Jay & Cee Catering Co." and not plaintiff was entitled to possession and ordered the master's fees assessed against plaintiff. On January 26, 1959, plaintiff appealed from these orders in #47736. On February 20, 1959, the court ordered a writ of assistance on motion of "Jay & Cee". Plaintiff appealed from this order in #47737. On March 26, 1959, the Clerk of the Court was ordered to pay over to defendant Sudler & Co., rent money deposited by plaintiff during the pendency of the suit, and on April 14, 1959, costs were ordered assessed against plaintiff. Plaintiff appealed from both of these orders in #47805. The three appeals have been consolidated in this court.

On March 22, 1954, plaintiff leased from the McCormick Estate for a restaurant, the premises at 26-28 N. La Salle St.



Under the lease, the lessors had the right to terminate on April 30 in any year should they desire "to sell the said building or the land thereunder, or to make a ground lease of said land," provided written notice be given "on or before February first, in the year in which said lease is to be terminated." On November 29, 1957, notice was mailed to plaintiff that the lessors desired to sell the building. Plaintiff received the notice December 2, 1957. per Bill  
of  
1-6-58

Prior to the giving of notice, the McCormick Estate agreed to sell its interests in the land and building. On November 27, 1957, an escrow agreement was made between the McCormick Estate and State Mutual Life Assurance Co. providing, inter alia, that the McCormick Estate deposit an assignment of its leasehold interest in the portion of the building not owned in fee and a quitclaim deed to the remainder owned in fee. On December 9, 1957, the Escrowee pursuant to instructions, recorded the deed of the fee interest and the assignment of the leasehold interest, both dated October 18, 1957. The escrow was terminated on December 26, 1957, with a delivery of the documents. On February 10, 1958, Jay & Cee entered into a lease with State Mutual's lessee for the restaurant premises effective May 1, 1958. Since that time Jay & Cee has been paying rent under its lease. per Bill  
of  
1-6-58

Plaintiff filed this suit for declaration of its right of possession on April 30, 1958. The cause was referred to a Master in Chancery who ordered the rent deposited with the Court Clerk, and, on October 21, 1958, found the issues against plaintiff. The Circuit Court approved and confirmed the master's



report, dismissed the action against all defendants except Jay & Gee, and declared that Jay & Gee was entitled to possession from May 1, 1958. Subsequently, the court granted the writ of assistance, directed the Clerk to deliver to Sudler & Co., State Mutual's lessee, the rent money on deposit, and assessed the costs against plaintiff.

Defendants contend that under section 50(2) of the Civil Practice Act, ch. 110, Ill. Rev. Stat. (1957), we are without jurisdiction to hear the first two appeals since a determination of the party entitled to the sum deposited in the custody of the Clerk remained unsettled. Section 50(2) was aimed at preventing piecemeal appeals in cases of multiple claims or multiple parties and the "uncertainties attending a precise definition of a final order in all cases...." Ariola v. Nigro, 13 Ill. 2d 200, 202-Q3. In some of the cases cited by defendants on this point, an issue or a claim remained to be resolved in the trial court at the time the appeal was heard, but here all the appeals have been consolidated and the whole matter is now before us. In other cases, courts held they were without jurisdiction, but nevertheless permitted appellants to seek the requisite finding of "no just cause for delay" immediately in the trial court in order to vest jurisdiction. O'Hara v. Carrillo, 18 Ill. App. 2d 106. See Ariola v. Nigro, 13 Ill. 2d 200. We have no need of sending plaintiff back to the trial court since all the issues are before us. Therefore, even assuming we had no jurisdiction of the first two appeals under section 50(2), the third appeal gives



us jurisdiction to review the entire record.

There is no merit in the contention of defendants that we have no jurisdiction because no notice of appeal and bond were filed in the writ of assistance order appeal, #47737, as required by the Forcible Entry and Detainer Act, ch. 57, sec. 19, Ill. Rev. Stat. (1957). They argue that since the relief is the same under the writ and under that Act, the latter ought prevail; otherwise the result would violate the Illinois constitutional requirement that "the force and effect of the process, judgments and decrees.... shall be uniform." Art. VI, sec. 29, Illinois Constitution. The writ of assistance was an incidental remedy to enforce the declaratory judgment by evicting plaintiff and the Forcible Entry and Detainer Act is not applicable. Uniformity is not achieved by permitting a litigant use of the procedure from one statute in trying his cause and then the denial of an appeal for failing to conform with another statute providing similar relief.

Defendants next contend that plaintiff's failure to file objections in the trial court precludes them from pursuing the last two appeals in view of section 57.1(3) of the Civil Practice Act, ch. 110, Ill. Rev. Stat. (1957). That subsection provides:

If further relief based upon a declaration of right becomes necessary or proper ... application may be made by petition ... for an order ... to show cause why the further relief should not be granted forthwith, upon reasonable notice....

Let's see  
out date  
6-60





Defendants followed the prescribed procedure and notified plaintiff the day before the petition for the rule was filed. The court, however, did not order the rule issued but summarily granted the writ of assistance. Plaintiff did not appear in response to the notice, perhaps relying upon the Statute to await service of the rule. Instead of the rule, the writ of assistance was served. Plaintiff made no attempt to vacate the order granting the writ, and the court had no opportunity to reconsider the propriety of the procedure followed. All this is true too of the proceedings with respect to the rent deposits and the costs. Plaintiff made no attempt to have the court determine the validity of the proceedings. We cannot approve the disregard of the statutory procedure, but plaintiff has waived the error. It is apparent that plaintiff was content to rest its hope in challenging the declaratory judgment.

Plaintiff contends on the merits that the absence of the conditions precedent to the notice of termination of plaintiff's lease invalidated the purported termination.

The relevant portions of these conditions are: "if the lessor ... shall desire to sell the said building or the land thereunder, or to make a ground lease of said land." Plaintiff contends the court erred in finding that the second condition, "sell the said building", was met since defendants' fee included only part of the building and the land, and the third condition, "a ground lease of said land", remained unfulfilled since the McCormick Estate lease included the other part and not the whole. Therefore, it argues, the phrase "sale of a building" was erroneously



-6-

construed to mean something broader than the common everyday meaning.

A primary consideration in the construction of a written agreement is the intention of the parties at the time the instrument was executed. Bonde v. Weber, 6 Ill. 2d 365. Even though the language in the instrument is unambiguous, if an application of that language to the facts existing at the time the instrument was executed renders the meaning unreasonable, courts consider facts and circumstances tending to ascertain the real intention of the parties, Great Northern Life Ins. Co. v. Federal Life Ins. Co., 260 Ill. App. 369. It is evident from the lease that the McCormick Estate wanted a provision for termination in the event it "sold" the building. It considered itself the "owner" of the land and the building although its property interest in one portion was a long term lease, and it could not, in the strict sense, sell the building in fee since it did not possess the whole in fee. However, it clearly intended to reserve the right to terminate in the event it decided to convey its interest in the property. Plaintiff agreed to this condition presumably considering McCormick Estate to be the owner of the entire fee. The fact that plaintiff may have misconstrued the extent of the McCormick Estate's ownership in the land and building had no effect on plaintiff's rights either at the time of making the lease or at the time of termination. In view of the three disjunctive conditions precedent for termination which plaintiff accepted, it is evident that plaintiff intended the Estate to have the right to terminate if it divested



itself of its interests in the property. Therefore, construing the second condition in light of the circumstance surrounding the execution of the lease, we think the construction of the court was right.

Plaintiff claims the notice to terminate was invalid because it was given by the McCormick Estate after it had transferred all of its right, title and interest in the property as evidenced by the recorded documents dated prior to November 27, 1957. While there is a presumption that a deed or other conveyance was delivered on the date affixed to the document, the presumption is not conclusive and may be rebutted by contrary evidence. Clokey v. Wabash Ry., 353 Ill. 349. The McCormick Estate interests did not pass until the escrowee made delivery of the instruments at the time the conditions of the escrow agreement were fulfilled. Huber v. Williams, 338 Ill. 313. There is no merit to the claim, therefore, since this fact overcomes the presumption.

We find no error in the master reopening the case and permitting evidence of the McCormick Estate's title on November 29, 1957, for the record shows no abuse of discretion in the order. Havill v. Darch, 320 Ill. App. 667, 671; Rosehill Cemetery Co. v. City of Chicago, 352 Ill. 11. The case of Roeder v. Pipe, 235 Ill. App. 89, cited by plaintiff, does not apply since it involved the refusal of a master to reopen after having filed his report and in the face of a patent lack of diligence.



There is no merit to plaintiff's claim that defendants should have been equitably estopped from presenting this evidence. An owner of property, who by his conduct, knowingly allows another to appear as owner to the damage of a third who relies on that conduct, will be estopped from claiming title against the third person. Lambert v. Dabbs, 302 Ill. App. 400; Lowenberg v. Booth, 330 Ill. 548. But here the McCormick Estate claimed title in its notice of termination of November 29, 1957, and plaintiff did not make inquiry of title of either the McCormick Estate or the new owners. It elected to stay in possession despite the notice of termination. Also, the damage claimed by plaintiff in the brief is that it was "forcibly evicted from the premises, lost its business and customers, incurred ... expenses, and was publicly embarrassed and maligned." But this was well after plaintiff was informed of the escrow agreement.

The notice to terminate was signed by one Heimbeck, the McCormick Estate's agent. Heimbeck was the manager of real estate for the McCormick Estate and had been for eight years. He negotiated the subsequent sale of the McCormick Estate's interest in the building, and as agent of the estate, he signed the notice of termination. We think these facts sufficiently show Heimbeck's authority. The defendants' notice was sufficient.

We have considered the points we deem necessary for our decision. The judgment is affirmed.

AFFIRMED.

MURPHY, P. J., and BURMAN, J., CONCUR.

ABSTRACT ONLY.





47797

STEVEN E. CHAPIN,

Plaintiff - Appellee,

v.

LILLIAN RAVEN and ROBERT BLEVITZKY,  
also known as ROBERT BLEVITT,

Defendants - Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Plaintiff confessed judgment for \$375.50 on a lease and within 30 days defendants moved to open the judgment. The motion, supported by defendants' joint affidavit, was denied and they have appealed.

Defendants and plaintiff entered into a lease January 1, 1957, for a term ending April 30, 1960. The lease provided, "Lessees certify that the Apartment ... shall be occupied by two (2) persons, namely, Mrs. Lillian Raven and her daughter...." Mrs. Raven married defendant Blevitt about December 23, 1958, and he, thereafter, moved into the apartment with his wife and step-daughter. They occupied the apartment until February 28, 1959 when they surrendered possession to plaintiff.

The judgment covers rent for January and February, 1959, and attorney's fees and costs.

The question is whether the motion to open and the supporting affidavit disclose a meritorious defense to the whole or part of plaintiff's claim. Rule 2, sec. 23(2), Mun. Ct. Rules. Diligence is not at issue since the motion was presented within 30 days of judgment, and plaintiff has never contested the



allegation of due diligence. The affidavit is to be measured by the standards set for affidavits in motions for summary judgments. They must be stated with particularity; statements of conclusions are insufficient to open up a judgment under the rules. Kirchner v. Boris & Dave Goldenhersh, Inc., 315 Ill. App. 305. Statements which defendants could testify to if called as witnesses will be taken as true for the purposes of the motion. Willey v. Lawton, 8 Ill. App.2d 344.

We think the statements in the affidavit comprising the first defense, i.e., an oral agreement to cancel, do not measure up to the legal standard. The statements are "that at this time plaintiff and defendants entered into a certain oral agreement whereby the aforesaid lease was to be terminated ... and as a result of said agreement said lease was cancelled and terminated." Affiants could not testify to these conclusions if called as witnesses. Nor could they testify to the conclusions that they and plaintiff "orally agreed" that Blevitt's occupancy "would necessitate" the cancellation of the lease.

Defendants cite White v. Walker, 31 Ill. 422, and McNeill v. Harrison & Sons, Inc., 286 Ill. App. 120, as authority for admissibility of the statements in the affidavits with respect to the oral agreement. We need only say that these cases are not authority for sustaining the instant affidavits.

The "further defense" consists of the statements of affiants that "plaintiff was duly informed and was thereafter fully aware" that Blevitt had moved in and had "in fact, consented"



-3-

to Blevitt's moving in; that an "actual and continued change of possession" occurred; and that this amounted to a surrender of the written lease. Even assuming that these would have been admissible from the witness stand, we think the contention is without merit. No case cited supports the thin theory that there was in the instant case a change of position amounting to a surrender. The fact that plaintiff consented to Blevitt's moving in adds nothing. The restricted occupancy provision was for the exclusive benefit of the lessor and could be waived by him. 24 Ill. Law & Practice, sec. 54 (1956).

We conclude that the judgment should be affirmed.

JUDGMENT AFFIRMED.

MURPHY, P.J. AND BURMAN, J. CONCUR.

ABSTRACT ONLY.



STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10247

Agenda No. 7

|                                     |   |                   |
|-------------------------------------|---|-------------------|
| Fedco Electrical Contractors, Inc., | ) |                   |
|                                     | ) |                   |
| Plaintiff-Appellee,                 | ) |                   |
|                                     | ) |                   |
| vs.                                 | ) | Appeal from the   |
|                                     | ) | Circuit Court of  |
| Samuel M. Mcendree,                 | ) | Vermillion County |
|                                     | ) |                   |
| Defendant-Appellant.                | ) |                   |

ROETH, J.

Plaintiff filed suit against the defendant to recover upon an oral contract for the revision and installation of a lighting and electrical distribution system in a building occupied by defendant. The complaint alleged that plaintiff, at the special instance and request of defendant by virtue of an oral contract entered into on October 15, 1956, had furnished labor and material and performed the oral contract and that there was due it, after crediting certain payments by defendant, the sum of \$1680.89. Defendant's answer denied the allegations of the complaint.

The case came on for trial before the court without a jury on November 12, 1958. At that time counsel moved to amend the ad damnum from \$1680.89 to \$1846.78 and to add an allegation to

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the complaint alleging that the difference was for claimed interest on the account. Counsel for defendant made a perfunctory objection which was denied with comment by the trial judge as follows:

"I will allow the motion to amend with the understanding that of course if counsel desires to make research to present the matter to the Court on the legal standpoint or propriety, that will be permitted in ample time."

Counsel for defendant then made a motion for a continuance of the trial of the case which was denied, whereupon the case proceeded to trial. The plaintiff's evidence discloses that plaintiff and defendant were not strangers to each other. Prior to the subject matter in question, plaintiff had done work for the defendant at various times both at his residence and at enterprises operated by defendant. On October 10, 1956, plaintiff was doing some work for defendant at a dry cleaning establishment operated by him. On that day defendant approached the president-manager and half-owner of plaintiff, who was present on the job, and asked him to lay out a lighting job for another building in which defendant was interested. Complying with the request, plaintiff, after looking at the building, prepared and submitted to defendant a proposal of certain work to be performed, explained what was recommended and estimated the time and labor cost at \$1200.00. Defendant told plaintiff's president-manager to go ahead with the

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

REPORT OF THE PHYSICS DEPARTMENT

FOR THE YEAR 1955

BY THE PHYSICS DEPARTMENT

CHICAGO, ILLINOIS

1956

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work. A job ticket was then prepared and plaintiff ordered the necessary material. During the course of the work the defendant visited the building from time to time, made changes and additions as the work progressed and left it up to plaintiff to make the changes and additions which he requested.

Plaintiff had a bookkeeper who kept the records for the corporation. She produced the original job file which she as bookkeeper had kept, and testified that when a job is obtained it is given a job ticket number to identify the particular job; that the men on the job are given the job ticket with the particular number on it so that they can take care of the daily time charges; that at the end of each week she totaled the time charges and charged it to the job on the records of the plaintiff. As to materials, stock requisition sheets were kept in the shop and as materials were taken out they were charged on the requisition sheet; that these likewise were charged to the job by her. She further testified that progressive bills are sent out by her to the customer from time to time. Plaintiff's Exhibit 1 consists of a number of sheets from the original books of entry showing all time and labor and materials furnished and charged to this particular job. At the time this exhibit was offered and admitted, counsel for defendant stated that he had no objection to it

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

2. The second part of the report is a detailed description of the study area. It includes information about the location of the study area, the population of the study area, and the characteristics of the study area. It also discusses the data sources used in the study.

3. The third part of the report is a description of the methodology used in the study. It includes information about the research design, the data collection methods, and the data analysis methods. It also discusses the limitations of the study.

4. The fourth part of the report is a description of the results of the study. It includes information about the findings of the study, the conclusions drawn from the findings, and the implications of the findings. It also discusses the strengths and weaknesses of the study.

5. The fifth part of the report is a conclusion and recommendations. It summarizes the findings of the study and provides recommendations for future research. It also discusses the overall contribution of the study to the field of study.

subject to the right to cross examine and object to its relevancy.

It appears from the evidence that a so-called progressive bill was submitted to defendant on or about November 28, 1956, which showed a billing of material to that date in the amount of \$1341.89 and labor in the amount of \$358.07. After receiving this bill defendant talked to the president-manager of plaintiff and requested a change and said he wanted the materials figure reduced and the labor figure increased with a notation that an error had been made in the breakdown. The record does not reveal the reason for this request. In any event the request was honored and the materials figure was reduced to \$802.18 and the labor figure was increased to \$897.78. A final billing was sent to defendant on February 14, 1957, showing a total job price and amount due of \$2,130.89. After rendition of the final bill, plaintiff's president-manager contacted the defendant personally and by phone requesting payment of the bill. As a result 4 payments were made totalling \$450.00, on March 22, 1957, October 1, 1957, December 10, 1957 and February 3, 1958. It is uncontradicted in this record that at no time did defendant question the amount of the bill or the quality of the work performed or that he owed plaintiff's bill. It is further established without denial on the part of defendant that on various occasions he promised to pay the bill.

Subject: [illegible]

Reference: [illegible]

Date: [illegible]

1. [illegible]

2. [illegible]

3. [illegible]

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10. [illegible]

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12. [illegible]

13. [illegible]

14. [illegible]

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18. [illegible]

19. [illegible]

20. [illegible]

One further facet of the evidence should be noted. At the time the work on this project was in progress, defendant was operating a dry cleaning establishment known as Modern Dry Cleaners. He was also operating a business known as Mar-Mak Rug Dry Cleaning Machinery Mfg. Co. in the building where the work involved in this suit was done by plaintiff. Plaintiff had done work for defendant at Modern Dry Cleaners. Although defendant was the owner of Modern Dry Cleaners, plaintiff carried the account on its books, for separation of accounts purposes, under the heading of Modern Dry Cleaners. Plaintiff at this time also had an account on its books for work done personally for defendant, which it carried as Samuel McKendree, personal. When the account for the job here in question was opened it was labelled Mar-Mak, for separation purposes. The defendant carried checking accounts in the bank both under the name of Modern Dry Cleaners and Mar-Mak Rug Dry Cleaning Machinery Mfg. Co. On September 11, 1957, defendant was owing plaintiff \$107.87 on the Modern Dry Cleaners account and defendant on that day drew a check on the Mar-Mak Rug Dry Cleaning Machinery Mfg. Co. bank account for this amount which paid the account in full. In December, 1957, defendant was owing plaintiff on his personal account the sum of \$22.04. Plaintiff's president-manager called him and requested payment, whereupon defendant signed and sent plaintiff a check for this amount drawn on the Mar-Mak Rug Dry

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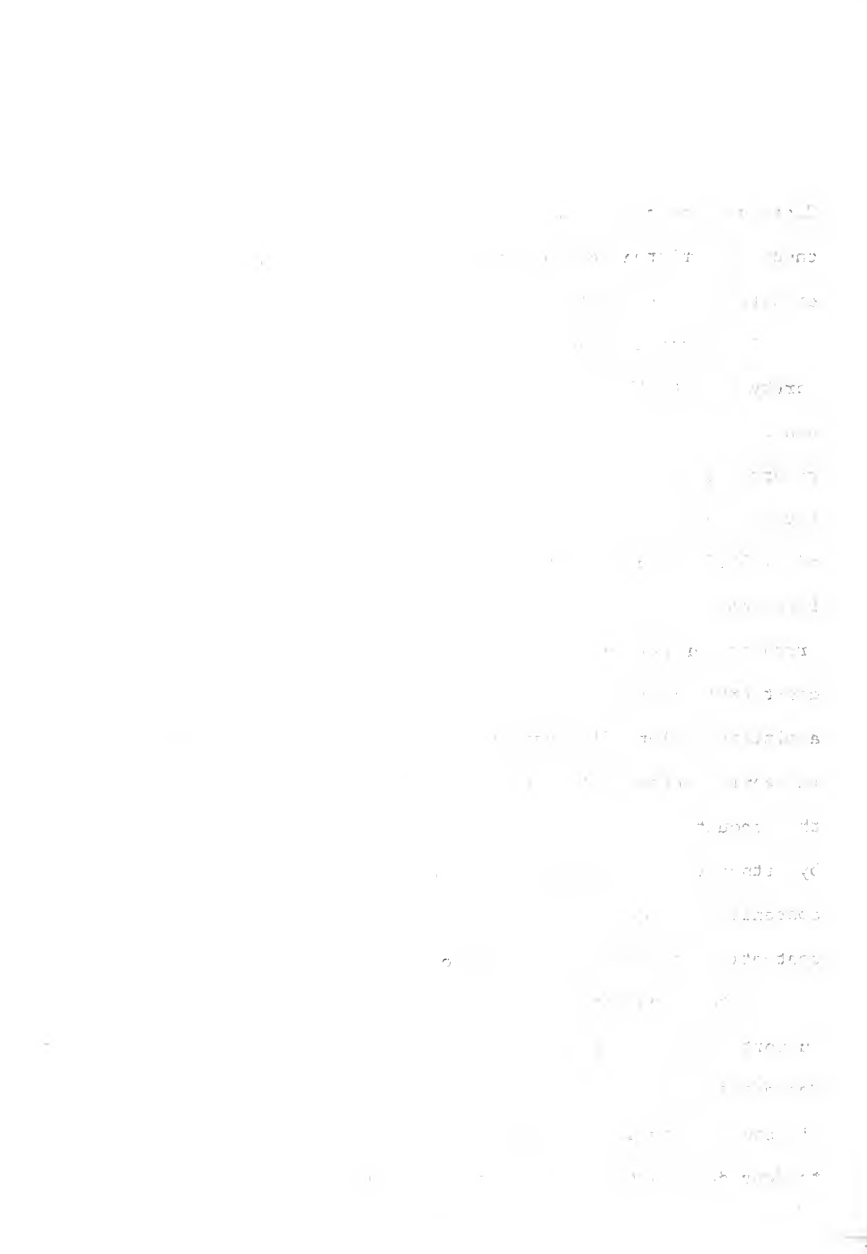
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Cleaning Machinery Mfg. Co. bank account. On the stub of the check was written "account paid in full to date". This check was credited to defendant's personal account and the account closed.

The foregoing facts are undisputed in the record. It is worthy of note that the defendant did not testify in his own behalf and offered no evidence except the checks hereinbefore referred to, in defense of this suit. Accordingly the trial judge entered judgment for plaintiff and against defendant for the sum of \$1846.76 which amount included an interest item of \$165.89. Defendant filed a post trial motion contending (1) the court erred in permitting plaintiff to increase the ad damnum, (2) the court erred in refusing a continuance, (3) the court erred in admitting plaintiff's exhibit 1 in evidence, (4) the court erred in denying defendant's motion to strike all evidence regarding the account owed by Mar-Mak, (5) the verdict was not supported by either the evidence or the law. These are essentially the contentions of counsel for defendant in this court. These contentions border upon the frivolous.

As to defendant's first contention, no authority is cited in support of this contention and we doubt if any can be found. Defendant next contends that after plaintiff materially amended his cause of action by increasing the ad damnum, it was error to deny defendant a continuance as a matter of right. This



assumes that an increase in the ad damnum is such a material amendment. Such is not the law. Hobson v. St. Louis, Springfield and Peoria Ry. Co., 180 Ill. App. 84. Furthermore defendant by his answer had already denied liability so we cannot see how defendant can now contend that he was taken by surprise. As to the contention that the court erred in admitting plaintiff's exhibit 1, we have already noted that this exhibit was admitted by stipulation subject to the right of defendant's counsel to cross examine and object to its relevancy. Aside from the stipulation, the necessary foundation proof noted in Rude v. Seibert, 22 Ill. App. 2d 477 , 161 N.E. 2d 39, was made. Defendant's counsel was given the full right of cross examination which developed nothing that would prohibit its admission in evidence. Since defendant in his answer had denied, among other things, that the work had been performed, plaintiff's exhibit 1 was material and relevant to prove this fact. Defendant's claimed error in refusing to strike the testimony referring to the Mar-Mak account is apparently based upon the contention that Mar-Mak was not sued as such nor was defendant sued as doing business as Mar-Mak (referring to Mar-Mak Rug Dry Cleaning Machinery Mfg. Co.). However, the undisputed evidence is that defendant was the owner of Mar-Mak, that he operated it and that it was an individual

Executive Order 11652, dated July 1, 1972.

Administrative Order 11652, dated July 1, 1972.

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proprietorship. Furthermore the evidence is sufficiently clear, as we have heretofore pointed out, that the designation on plaintiff's books of Mar-Mak account, was merely to identify what job the particular work and materials were going into. Defendant also contends that by giving the check for \$22.04 in December, 1957, with the notation hereinbefore noted, there was an accord and satisfaction. First of all the evidence does not support any such contention. There is nothing in the record to show defendant ever intended to so regard this check. In fact he made two payments on the account in question after the December, 1957 check for \$22.04. Furthermore, at the time this check was given there was no dispute as to the account. Defendant had admitted he owed it and had promised to pay.

The judgment of the trial court is fully supported by both the evidence and the law and accordingly the judgment of the Circuit Court of Vermilion County is affirmed.

Affirmed.

Reynolds, P.J., and Carroll, J., concur.

the following cases: (1) a case of acute myocardial infarction, (2) a case of chronic myocardial infarction, (3) a case of acute myocardial infarction with pulmonary embolism, (4) a case of chronic myocardial infarction with pulmonary embolism, (5) a case of acute myocardial infarction with pulmonary embolism and (6) a case of chronic myocardial infarction with pulmonary embolism. The first case was a 45-year-old male who died of a sudden death. The second case was a 60-year-old male who died of a sudden death. The third case was a 40-year-old male who died of a sudden death. The fourth case was a 55-year-old male who died of a sudden death. The fifth case was a 35-year-old male who died of a sudden death. The sixth case was a 45-year-old male who died of a sudden death.

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PUBLISHED WEEKLY  
CHICAGO, ILL., MAY 1, 1930

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STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

General No. 10251

Agenda No. 10

|                      |   |                  |
|----------------------|---|------------------|
| Alfie Lloyd Mayes,   | ) |                  |
|                      | ) |                  |
| Plaintiff-Appellee,  | ) | Appeal from the  |
|                      | ) | Circuit Court of |
| vs.                  | ) | Cass County      |
|                      | ) |                  |
| Edna Minnie Mayes,   | ) |                  |
|                      | ) |                  |
| Defendant-Appellant. | ) |                  |

Roeth, J.

Plaintiff and defendant were married on May 29, 1922, and lived together as husband and wife until 1943. No children were born of this marriage. On July 3, 1943, plaintiff filed suit for divorce charging defendant with cruelty. Defendant entered her appearance in the divorce suit and a decree of divorce was entered on July 14, 1943, granting plaintiff the divorce on the ground of cruelty. The decree also provided as follows:

"The Court further finds that the Parties to this cause have reached an agreement concerning the payment of maintenance and support money for the Defendant; which said amount to be paid by the Plaintiff shall be one-half ( ) of his wages, salary or earnings received from time to time from the Chicago, Burlington and Quincy Railroad Company (a corporation) or any other firm, person or corporation in whose employment the Plaintiff may hereafter be employed; the Court further finds that at any time the Defendant,

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Edna Minnie Mayes, shall re-marry the payment of the maintenance and support money, heretofore mentioned, shall cease."

Plaintiff complied with the above noted agreement until November 1, 1954, when he filed a petition to modify the original decree, in which petition he alleged that defendant had agreed to a modification of said decree so that the support and maintenance provisions would be reduced to \$50.00 per month. Defendant entered her appearance and filed a written consent to the modification. Thereupon a modifying decree was entered, which after reciting the agreement of the parties, decreed that henceforth plaintiff should pay defendant \$50.00 per month for her maintenance and support. Plaintiff complied with the modifying decree until October 29, 1958.

On October 29, 1958, plaintiff filed a petition praying that he be relieved from any further payments to defendant. The gist of this petition is as follows:

Your Petitioner further represents unto the Court that the said Edna Minnie Mayes has not remarried but during all the time since the granting of said divorce she has been gainfully employed by the Illinois Bell Telephone Company at Beardstown, Illinois and at the present time is earning approximately \$200.00 per month so that from the time of the granting of said divorce until the present time the said Defendant, Edna Minnie Mayes, with her salary from the Illinois Bell Telephone Company and the amount of payments from your Petitioner, that the said Defendant has received far more moneys than your Petitioner.



"Your Petitioner further represents unto the Court that he has now remarried and is trying to purchase a home.

"Your Petitioner further represents unto the Court that he is informed and now believes that since he secured the divorce for the fault of the said Edna Minnie Mayes that he should not be obligated to pay to her anything for her support and maintenance since she is physically able and does earn more moneys by her employment than is required for her support and maintenance, and further your Petitioner believes under the law he should not be required to pay her anything for her support and maintenance."

This petition was contested by defendant and a hearing was held thereon. The trial court granted plaintiff's petition and terminated the support and maintenance provisions, reserving however, jurisdiction for future consideration should hardship develop. This appeal followed.

At the outset it thus appears, that the provisions for support and maintenance of defendant, both in the original decree of divorce and the modifying decree of 1954, were the result of agreements of the parties. The rules of law applicable to such agreements are fully set forth in Smith v. Smith, 334 Ill. 370, 166 N.E. 85; Walters v. Walters, 409 Ill. 298, 99 N.E. 2d 342; James v. James, 14 Ill. 2d 295, 152 N.E. 2d 582, and the most recent case, Guyton v. Guyton, 17 Ill. 2d 439, 161 N.E.2d 832. However, the fact that the decree fixing support money was entered pursuant to the consent of the parties does not preclude the court from modifying it on a change of circumstances, nor does the fact that the decree



adopts the terms of an agreement between the parties fixing support destroy or affect such power of the court. I.L.P. Divorce, Sec. 149 and cases therein cited. We are therefore required to examine the testimony adduced on the hearing to determine whether there has been such change of circumstances. In so doing, we are of the opinion that such examination should be limited to determining whether there has been a substantial change since the modification decree of November 1, 1954. Cole v. Cole, 142 Ill. 19, 31 N.E. 109; Darner v. Darner, 324 Ill. App. 160, 57 N.E. 2d 518; Cohen v. Cohen, 291 Ill. App. 39, 9 N.E. 2d 595.

Plaintiff is employed by the Chicago, Burlington & Quincy R. R. Co. as a switchman. He entered the employ of the railroad in 1926 and for extended periods between 1926 and 1943 was out of work due to economic factors. In 1954 his average gross wage was approximately \$4500.00 per year. From this amount, deductions were made for income tax purposes, pension, union dues, health insurance, etc. These deductions, exclusive of those for income tax purposes, amounted to between \$472.80 and \$544.80 per year. In 1956 plaintiff's gross wages had increased to \$5,790.52 and continued in this amount through 1957 and 1958. His deductions, except possibly for income tax purposes, remained the same during these years. Plaintiff is 60 years of age and in good health. He remarried on November 8, 1954, and purchased a home in October,



1958, upon which he is currently making mortgage payments of \$64.50 per month. He has a substantial equity in this home. He has a car of 1954 vintage and a bank account of \$200.00.

In 1954 defendant was employed as a supervisor by Illinois Bell Telephone Company, with which company she had worked since 1919. Her gross salary at that time was \$3472.00 per year. From this amount, deductions were made for income tax purposes, social security, sick benefits, saving bond purchases and employee stock purchases. These deductions, exclusive of those for income tax purposes, amounted to an average of approximately \$1460.00 per year. In 1955 defendant's gross salary was \$3,356.00, in 1956 - \$3474.83, in 1957 - \$3242.09, and in 1958 - \$2879.28. Defendant is 57 years of age and she is currently under a doctor's care. She was in a hospital for almost 2 months in 1958 and incurred expenses over and above the amounts paid by health insurance. For health reasons she has been required by her company to leave the position as supervisor and take a job as operator. In fact the trial judge in his written opinion rendered after the hearing noted that:

"The evidence discloses that the defendant is suffering from a physical or mental condition which has prevented her from retaining her former position as a supervisor, but up to the present time has permitted her to retain her position as a telephone operator. \*\*\* The court is somewhat troubled about the health of the defendant. Her demeanor and conduct





while testifying as a witness has given the court some cause for concern, and it is recognized by the court that if she would be required because of her health to retire from her position her income would be considerably lessened since the amounts received from her pension would not likely equal the amount of her present earnings.'

She has a car of 1955 vintage and a bank account of \$300.00.

Commencing in 1930 she started purchasing company stock (American Telephone & Telegraph Co.) on a payroll deduction plan and, apparently when the divorce was granted, owned 20 shares. Since 1943 she has purchased one \$18.75 saving bond a month on a payroll deduction plan and also is purchasing an additional 7 shares of company stock on a payroll deduction plan. Defendant also owns 3 vacant lots in Beardstown, the value of which is not disclosed by the record.

It is significant to note that both parties are currently undertaking to provide for their declining years, the plaintiff through his pension and sick benefit programs and the purchase of a home and defendant through a combination social security-pension program and the purchase of savings bonds and company stock.

Plaintiff undertakes to make much of the fact that he secured the divorce and that notwithstanding this fact he has paid the defendant a large sum of money over the years 1943 to 1958. He

the first part of the year 1941, the  
Government of the United States  
has been very busy with the war  
effort and has not had time to  
attend to the affairs of the  
Department of the Interior.

The second part of the year 1941  
has been very busy for the  
Government of the United States  
and the Department of the Interior  
has not had time to attend to  
the affairs of the Department.  
The third part of the year 1941  
has been very busy for the  
Government of the United States  
and the Department of the Interior  
has not had time to attend to  
the affairs of the Department.  
The fourth part of the year 1941  
has been very busy for the  
Government of the United States  
and the Department of the Interior  
has not had time to attend to  
the affairs of the Department.

The fifth part of the year 1941  
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Government of the United States  
and the Department of the Interior  
has not had time to attend to  
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The sixth part of the year 1941  
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and the Department of the Interior  
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and the Department of the Interior  
has not had time to attend to  
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further insists that as a general rule, when a husband secures a divorce from the wife for her misconduct she is not entitled to alimony or support money. The answer to these contentions is that through the years he agreed to pay the support money in the amounts paid and consented to be bound by the decree to this effect. We can only conjecture as to his reason for so doing.

The trial court had power to modify the decree of November, 1954, if subsequent changes in the conditions and circumstances of the parties rendered modification necessary. The decree should not have been modified unless it was shown that the conditions and circumstances of the parties had materially changed since November, 1954. As applied to the situation confronting the court in this particular case, this would have required a showing that the needs of the wife had decreased or that the ability of the husband to pay had decreased. The record discloses that neither factor is present. And in passing, the remarriage of the plaintiff does not alter this requirement. Stewart v. Stewart, 1 Ill. App. 2d 283, 117 N.E. 2d 579.

At the time defendant answered the petition to terminate the support payments, she also filed a counter-petition asking for an increase in the monthly payments to \$75.00 per month. This counter-petition was denied by the trial judge. If we



correctly interpret the briefs of counsel for defendant, he contends that if the trial court order is reversed, then this court should increase the support payments. This we cannot do. Buehler v. Buehler, 373 Ill. 626, 27 N.E. 2d 466.

Accordingly the decree of the Circuit Court of Cass County terminating support payments will be reversed.

Reversed.

Reynolds, J., and Carroll, J., concur.

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